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In The

Supreme Court of the United States

October Term, 1997

CLEAN (Citizens for Leaders with Ethics and Accountability Now!), a Washington non-profit corporation, et al.,

Petitioners,

v.

CITY OF SPOKANE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment protect citizens' state-created right of referendum against infringement by legislative declarations of emergency which are not supported by compelling justifications and are not subject to exacting judicial scrutiny?

PARTIES TO THE PROCEEDING

The petitioners are: CLEAN (Citizens for Leaders with Ethics and Accountability Now!), a Washington non-profit corporation; Spokane Research and Defense Fund, a Washington non-profit corporation; Coalition for a New Spokane, a Washington non-profit corporation; Priorities First, a Washington political committee; Richard Adams, an individual; John J. Talbott, an individual; and Margaret Leonard, an individual.

The respondents are: City of Spokane, a Washington first class charter city; Spokane Public Development Authority, a City of Spokane public corporation; Citizens Realty Company, a Washington corporation; and Lincoln Investment Company of Spokane, a Washington corporation.

LIST OF PARTIES, PARENT COMPANIES, AND NONWHOLLY OWNED SUBSIDIARIES

Pursuant to Rule 14.1(b) and Rule 29.6, petitioners state that three of the petitioners are Washington non-profit corporations and that none of them have any parent companies or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners CLEAN, et al., petition for a writ of certiorari to review the judgment of the Washington Supreme Court in this case.

I. OPINIONS AND ORDERS BELOW

The opinion of the Washington Supreme Court (App. A, *infra*, 1a-40a) is reported at 133 Wn.2d 455, 947 P.2d 1169. The Washington Supreme Court's order denying petitioners' motion for reconsideration (App. B, *infra*, 41a) is unreported. The order of dismissal of the trial court (App. C, *infra*, 42a-67a) is unreported.

II. JURISDICTION

The Washington Supreme Court issued its opinion on November 13, 1997. Petitioners timely moved for reconsideration on December 1, 1997. App. D, *infra*, 68a-73a. On February 5, 1998, the Washington Supreme Court issued its Order Denying Motion for Reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

III. CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law. . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

petition the Government for a redress of grievances.

Section 83 of the Spokane City Charter provides:

Section 83. Referendum.

If, prior to the date when any ordinance shall take effect, a petition signed by qualified electors in number at least equal to ten percentum of the total number of votes cast at the last preceding general municipal election, shall be filed with the clerk, protesting against the enactment of such ordinance, it shall be suspended from taking effect. Thereupon the council shall reconsider such ordinance and, if it does not entirely repeal the same, shall submit it to popular vote at the next municipal election; or, the council, in its discretion, may call a special election for that purpose; and such ordinance shall not take effect, unless a majority of the qualified electors voting thereon at such election shall vote in favor thereof.

Section 19(a)(1) and (b) of the Spokane City Charter provide:

Section 19. Ordinances – When Effective.

(a) The following ordinances may be passed by the city council on the first reading by title and shall take effect immediately upon passage, unless otherwise provided in the ordinance:

1. An ordinance necessary for the immediate preservation of the public peace, health or safety or for the immediate support of city government and its existing public institutions; provided it has in its preamble or body a statement

of the facts giving rise to the necessity for immediate effectiveness and it is passed by a vote of one more than a majority of the council;

* * *

(b) All other ordinances enacted by the city council shall take effect thirty days after the date of their passage unless a later date is fixed therein, in which event they shall take effect at such later date.

IV. STATEMENT OF THE CASE

Petitioners seek review of decisions abridging their fundamental right of referendum regarding an ordinance to provide public financial support for a parking garage and shopping mall project in downtown Spokane, Washington. App. A, *infra*, 2a.

As originally proposed, the ordinance committing the City of Spokane to subsidize this project contained no "emergency" clause. Accordingly, the ordinance would have been subject to the public right of referendum secured in § 83 of the Spokane City Charter. App. A, *infra*, 15a. However, on the day the ordinance came before the Spokane City Council for a vote, the mall developer delivered a letter demanding that the ordinance be passed with an emergency clause making it "immediately effective." App. F, *infra*, 93a-99a. In response to the developer's letter, the City Council of Spokane added a new section 14 asserting an emergency and enacted Ordinance No. C31823. App. E, *infra*, 74a-92a.

The effect of section 14 was to preclude exercise of the right of referendum which otherwise was available to

the voters of the City of Spokane pursuant to § 83 of the Spokane City Charter (*reprinted* on page 2, *supra*). Pursuant to § 83, the submission of a petition signed by ten percent of the number of voters who voted in the last preceding general elections suspends an ordinance from taking effect, if the petition is submitted prior to the effective date. *Id.* Upon submission of such a petition, the City Council may either repeal the challenged ordinance or submit it to popular vote. *Id.* The ordinance does not become effective unless a majority of the voters vote in favor of it. *Id.*

Spokane ordinances generally take effect 30 days after the date of their passage. Spokane City Charter, § 19(b) (*reprinted* on page 3, *supra*). Accordingly, the City's voters have 30 days in which to obtain and submit the required voters' signatures for their petition. Here, petitioner Priorities First presented a referendum petition to the Spokane City Clerk three days after enactment of Ordinance C31823, on January 30, 1997.[1] After discussions with the Clerk and City Attorney, Priorities First's petition was assigned the number "Referendum Petition

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[1] This was done in accordance with Spokane Municipal Code § 2.02.130, *Commencement of Referendum*, which provides:

> A legal resident or political committee begins the referendum process by requesting from the city clerk the assignment of a referendum number and identifying the ordinance, or section[s] thereof, sought to be referred. If the clerk is satisfied that the person is entitled to sponsor the petition, and if the ordinance has not yet taken effect, then the Clerk assigns the measure a number and furnishes to the sponsor a copy of the ordinance.

97-1," thereby certifying the City Clerk's "satisf[action] that the person is entitled to sponsor the petition and . . . the ordinance has not yet taken effect." SMC 2.02.130, *reprinted* in note 1, *supra*.

The referendum proponents thereafter secured and submitted nearly twice the number of signatures required in support of their petition. Within 30 days, they submitted referendum petitions signed by more than 8,000 electors, needing but 4,300 to qualify. (A copy of the petition is reproduced as App. G, *infra*, 100a-103a. The proponents submitted 550 pages with signatures.) Notwithstanding the City Clerk's prior assignment of a petition number, the City refused to honor the referendum petition on the basis that Ordinance No. C31823 had taken effect immediately pursuant to the § 14 "emergency clause" which was tacked onto the ordinance after the developers submitted their letter.

Section 19(a)(1) of the Spokane City Charter provides for the immediate effectiveness of:

> An ordinance necessary for the immediate preservation of the public peace, health or safety or for the immediate support of city government and its existing public institutions; . . .

See page 2, *supra*. Ordinance C31823 recited that Spokane's central business district (CBD) "has experienced a serious economic decline . . . adversely affecting the citizens of the City and causing deterioration of the public and private investment in improvements and services in the CBD . . . " App. E, *infra*, 80a. The ordinance then recited the City's receipt of the developer's letter "containing Project information and a deadline indicating

that time is of the essence concerning the Project and the Facility, such that immediate assurances must be given by the City in order for the Developer to proceed with the Project, . . . " App. E, *infra*, 81a.

These recitals set up § 14 of the ordinance, entitled "Urgency and Emergency; Effective Date." App. E, *infra*, 90a-92a. Section 14 stated that the ordinance will "have the direct benefit of promoting the creation of employment in the CBD," that it will "have the effect of stimulating the economy," and that it would provide other recreational, cultural, and economic benefit. *Id.* Section 14 then stated that the mall and garage project could not proceed unless the ordinance took effect immediately:

> The City further recognizes that the Developer must immediately execute leases to commit Nordstrom, plus other major tenants to the Project otherwise the Project will not be ready for occupancy and operation by the dates contractually required. If this contractual promise cannot be performed the Project will not be built and severe economic and other consequences will ensue.

Id. at 91a. Section 14 concluded:

> Based on such facts, the Council finds and declares that an urgency and emergency exists such that this Ordinance shall be immediately effective upon adoption in order to preserve the public peace, health or safety and provide support of the City government and its existing public institutions, facilities, and infrastructure.

Id. at 92a.

These statements were based on the developer's letter submitted on the day that the emergency clause was tacked on and the ordinance adopted. The developer stated:

> If the City's action in pledging the parking meter revenue is not effective and finalized tonight, these retailers will not commit to the required time schedule to come downtown. A delay of 30 days or even two weeks is fatal because the final approval of the HUD 108 loan, private financing, and issuance of the bonds are all contingent on each other . . . If these retailers cannot be assured within the next week that the City has made its final irrevocable commitment to the garage through pledging of parking meter revenues, the other components of the project cannot be timely finalized in order to begin Spring demolition and construction to meet September 1997 and March 1999 deadlines. To put it simply, a delay of 30 days while awaiting effectuation of the off-street parking ordinance will kill the project.

App. F, *infra*, 96a-97a.[2]

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[2] The developer's statements later proved false. Demolition did not begin in the spring, but rather began some six months later (a delay 12 times longer than the developer asserted would be "fatal" and six times longer than the developer stated "would kill the project") on October 14, 1997. In November, 1997 when the Washington Supreme Court wrote that "the project must begin construction in September 1997" (App. A, *infra*, 17a) that date already had passed without commencement of construction or even demolition.

Similarly, section 14 recited that "the Developer must immediately execute leases to commit Nordstrom." The

Petitioners challenged the ordinance in three separate superior court lawsuits which were consolidated. Petitioners appealed dismissal of their consolidated actions to the Washington Supreme Court. Petitioners challenged the City's financial participation in the mall and garage project on a number of grounds, relying upon state law and the Washington Constitution. The Washington Supreme Court refused to inquire into the City Council's emergency declaration, instead deferring to that declaration "unless it is 'obviously false and a palpable attempt at dissimulation.' " App. A, *infra*, 17a.

The court quoted the City Council's findings that downtown Spokane has "experienced a serious economic decline" and that the commitments " 'must immediately be received' by the Developers in order for the project to be completed on time." *Id.* The court made no inquiry into whether these statements of urgency established that immediate effectiveness was necessary "for the immediate preservation of the public peace, health, or safety," or "for the immediate support of city government and its existing public institutions." Spokane City Charter, § 19(a)(1).

The court held that its decision was controlled by its recent decision in *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1996). App. A, *infra*, 16a. There, the court had upheld an emergency clause in a state law passed to provide public support for a new baseball stadium on the basis that the Legislature reasonably could believe that

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developer announced the signing of a lease with Nordstrom more than a year later.

losing the Seattle Mariners major league baseball team "would produce a detrimental economic effect." App. A, *infra*, 16a. In the baseball stadium case, the court held that the term "public peace, health, or safety" was coextensive with the state's "police power." *CLEAN v. State*, 130 Wn.2d at 804, 928 P.2d at 1065. The only limitation on exercise of the police power, and hence the only restriction on the government's ability to preclude the citizenry from exercising their reserved constitutional right of referendum, was whether an action would "reasonably tend to promote some interest of the State . . . " *Id.* at 804-05, 928 P.2d at 1065.[3]

Four justices of the Washington Supreme Court expressed their concern that the majority's decision in this case, together with the recent decision in *CLEAN v. State*, had eviscerated citizens' right of referendum. Justice Guy had dissented in *CLEAN v. State*, but now acceded to the principle established in the two cases that "the economic welfare of a region may give rise to the kind of 'emergency' for which emergency legislation may be validly used." App. A, *infra*, 21a. Justice Madsen (who also had dissented in *CLEAN v. State*) now concurred because "*CLEAN v. State* dramatically altered judicial review." App. A, *infra*, 22a. She explained:

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[3] *CLEAN v. State* involved the referendum power reserved to the people of Washington in Washington Constitution Article II, § 1(b). In this case, the court found that the earlier *CLEAN* decision "is controlling" because "Section 19 of the Spokane City Charter is identical in relevant part to the constitutional provision interpreted in *CLEAN [v. State]*." App. A, *infra*, 16a.

> After *CLEAN*, this Court no longer conducts an independent analysis of whether a law is necessary for the immediate preservation of the public peace, health, or safety within the meaning of Const. art. II, § 1(b). The emergency exception is now coextensive with police powers.

App. A, *infra*, 22a-23a.

Justice Sanders (who authored the dissent in *CLEAN v. State*) concurred "reluctantly." He expressed his "greatest reluctance" with the majority's "imprimatur to the preposterous notion that a new parking garage for Nordstrom's is 'necessary for the immediate preservation of the public peace, health or safety . . . ' " App. A, *infra*, 23a. Justice Sanders recognized the effect of the first *CLEAN* decision:

> But this result is compelled by the majority decision in *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1996) wherein this court virtually repealed the citizens' constitutional right to referendum by allowing the Legislature to inoculate itself against referendums through conclusory emergency clauses not subject to meaningful judicial review . . .

Id. Justice Sanders concluded:

> Once the constitutional well has been poisoned, we all must drink from it lest the incentive to correct our mistakes in a principled fashion be lost by inconsistently imposing them.

App. A, *infra*, 24a. Even Spokane City councilmembers who voted to include the emergency clause recognized that there was no true "emergency" in the ordinary

("Webster's definition") of the word, and that the emergency existed only in the "legalese" established by *CLEAN v. State*. App. H, *infra*, 104a-105a. A second councilmember found "very troubling" the use of the word "emergency" outside the context "of public safety," *id.*, 107a, but also voted for the clause.

Chief Justice Durham (who had joined in the majority opinion in *CLEAN v. State*) dissented. After tracing the judicial history of cases in which the Washington Supreme Court had invalidated emergency clauses because "the factual bases for the alleged emergencies were not emergent," App. A, *infra*, 25a-29a, she quoted from a 1945 opinion of the court:

> We think it too clear to require argument that the legislature cannot defeat the constitutional right, reserved by the people . . . by *merely* inserting in an act . . .
>
> "This act is necessary for the immediate preservation of the public peace, health and safety . . . "

App. A, *infra*, 29a (emphasis in court's 1945 opinion).

Upon completing her review of the case law, Chief Justice Durham summarized:

> Thus, this court has never given conclusive effect to the assertion of emergency itself. To do so would be to abdicate our duty to evaluate the constitutionality of legislative action. It would be no different than deferring to a legislative declaration that an act were necessary to further a compelling state interest. Instead, this court has upheld declarations of emergency only

> when the facts established a need for immediate response to public peril.

App. A, *infra*, 38a.

In response to the majority's decision that emergency clauses thwarting the fundamental right of referendum no longer are subject to meaningful judicial review in Washington, petitioners sought reconsideration. Petitioners' motion for reconsideration asserted that the majority decision imposed a new burden on core political speech in violation of the First Amendment. App. D, *infra*, 68a-73a. Petitioners argued that the Washington Supreme Court's new deferential standard of review did not satisfy the standard of this Court's cases applying "exacting scrutiny" to state action which burdens core political speech, quoting *Meyer v. Grant*, 486 U.S. 414, 420 (1988).[4] The Washington Supreme Court called for a response to the motion for reconsideration pursuant to RAP 12.4(d), but thereafter denied the motion without opinion. App. B, *infra*, 41a.

V. REASONS FOR GRANTING THE PETITION

The Washington Supreme Court has changed the rules by which state and local governments may deny

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[4] Under Washington law, a constitutional right may be raised for the first time on appeal. *State v. Green*, 94 Wn.2d 216, 231, 616 P.2d 628 (1980); Washington Rules of Appellate Procedure (RAP) 2.5(a)(3). Respondents' response to petitioners' motion for reconsideration acknowledged petitioners' entitlement to raise the constitutional issue at this stage of the proceedings.

Washington citizens their fundamental right of referendum. Prior to that court's decision in this case and in *CLEAN v. State, supra,* the rule was that only those laws "necessary for the immediate preservation of the public peace, health, or safety" are excepted from the citizens' referendum power, and that Washington courts would look behind legislative declarations of emergency to determine whether the declared facts truly constitute an emergency. Now, however, the exacting requirement that a law must be necessary "for the immediate preservation of the public peace, health, or safety" before the people's fundamental right of referendum could be denied has been replaced by a rule that any law within the Legislature's authority can be excepted by an unreviewable declaration of emergency. *CLEAN v. State,* 130 Wn.2d at 830-41, 928 P.2d at 1078-83 (Sanders, J., dissenting). As Justice Sanders stated, the "new rule" is:

> If the Legislature says that the legislation is exempt from referendum, it is.

Id. at 842, 928 P.2d at 1084.

This Court should grant review because the Washington Supreme Court has decided an important question of federal law that has not been, but should be, settled by this Court. Supreme Court Rule 10(c). Because the Washington court's decision confirmed that a new constitutional rule has been substituted by that court in place of the plain language of the provision itself, this is not a case where the asserted error consists of "the misapplication of a properly stated rule of law." Supreme Court Rule 10. Moreover, Justice Sanders made clear that the Washington Supreme Court must now stand by its erroneous new

rule, as correcting the mistake would confirm that the Constitution had been bent to accommodate baseball. App. A, *infra*, 24a.

The Washington court's new constitutional rule thus is established in two of the court's decisions, *CLEAN v. State* and this case. Petitioners believe that the critical error below worthy of this Court's attention is the substitution of a lax and deferential "police power" standard for the exacting language of the Washington Constitution and Spokane City Charter, which demanded that an ordinance be "necessary for the immediate preservation of the public peace, health, or safety" before the right of referendum could be abridged. Further, in establishing a new rule of deference to the Legislature, the Washington court neglected its own prior recognition that the reserved right of initiative and referendum is "the first of all the sovereign rights of the citizen – the right to speak ultimately and finally in matters of political concern." *State ex rel. Mullen v. Howell*, 107 Wash. 167, 171, 181 P. 920 (1919). The Washington court's new rule of deference fails to appreciate that the issue "is not a question involving the separation of judicial from legislative power but the separation of the power of the people from legislative encroachment." *CLEAN v. State*, 130 Wn.2d at 827, 928 P.2d at 1076 (Sanders, J., dissenting). *See also Save Our State Park v. Hordyk*, 71 Wn. App. 84, 91, 856 P.2d 734 (1993) (deference should be given to "the people and their right of initiative" rather than to the legislative body seeking to deny that right).

Accordingly, petitioners essentially are asking this Court to review both of the Washington court's recent decisions, as the constitutional error pervades both of

them.[5] As Justice Sanders pointed out in this case, "the constitutional well has been poisoned" by the need perceived in *CLEAN v. State* to ensure that major league baseball remains in Seattle. App. A, *infra*, 24a. Accordingly, a "subsidiary question fairly included" (Supreme Court Rule 14.1(a)) is:

> Is Ken Griffey, Jr. more important than the Constitution?[6]

Of course, the more important question fairly included within this petition is whether these fundamental constitutional rights are protected by the United States Constitution as well as by state constitutions and local charters. This Court's decision in *Meyer v. Grant*, 486 U.S. 414 (1988) protected on First Amendment grounds citizens' right to pay initiative signature gatherers in support of their state constitutional initiative right. The Court held that signature gathering was "core political speech," 486 U.S. at 420, such that state restrictions must be subject to "exacting scrutiny." *Id., citing Buckley v. Valeo*, 424 U.S. 1, 45 (1976). *See also Brown v. Hartlage*, 456 U.S. 45, 60

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[5] Of course, the *judgment* in *CLEAN v. State* is final and not subject to this Court's direct review. But it is the flawed constitutional rule established in the two cases which this Court can and should correct.

[6] Mr. Griffey is a star player for the Seattle Mariners baseball team. Petitioners do not presume, as did the Washington Supreme Court, that this Court has special expertise with respect to the importance of a major league baseball team to a community. *CLEAN v. State*, 130 Wn.2d at 781, n.8, *quoting Flood v. Kuhn*, 407 U.S. 258, 266 (1972). Nor will petitioners speculate as to the expertise and sentiments of this Court regarding shopping centers, Nordstrom stores, and parking garages.

(1982) ("the State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech").

The Court in *Meyer* did not decide whether a state may restrict not only the manner in which these citizens' rights are pursued but also the very core of the right, consistent with the First Amendment. *See id.* at 424 ("the First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing"). However, several of the Court's statements provide strong support for petitioners' contention here that this right is federally protected. This Court quoted with approval the Court of Appeals' *en banc* decision it was affirming, including that court's holding:

> Having decided to confer the right, the State was obligated to do so in a manner consistent with the Constitution because . . . this case involves "core political speech."

Id. at 420.

The Court itself observed two separate restrictive effects inherent in the Colorado law which it found to be of federal constitutional dimension. In addition to limiting the number of voices who can convey the sponsor's message:

> Second, [the prohibition on paid signature gatherers] makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

Id. at 422-23. This second consideration demonstrates the Court's recognition that the initiative (and referendum) process itself is deserving of First Amendment protection, in addition to the protection afforded speech promoting an initiative measure. The Washington court's new rule allows the state routinely to prevent citizens from placing matters on the ballot and making them a "focus of statewide discussion," rather than merely "limiting" citizens' ability or making their measure "less likely" to qualify. *Id.*

The *Meyer* Court again linked First Amendment protection directly to the initiative process in describing as a "burden on First Amendment expression" (*id.* at 423) a Colorado statute which the Colorado Supreme Court said "limit[s] the power of the people to initiate legislation." *Id., quoting Urevich v. Woodard*, 667 P.2d 760, 763 (1983) (holding that statute must be "closely scrutinized"). In other contexts, this Court has recognized that state constitutional rights of speech and petition can exist on a coequal level with federally protected constitutional rights. *See, e.g., PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980) (state may enforce state constitutional right of speech and petition against shopping center owner's right of private property).

In *Meyer v. Grant*, this Court stated its agreement with the Court of Appeals' conclusion that the Colorado statute "trenches upon an area in which the importance of First Amendment protections is 'at its zenith.' " 486 U.S. at 425. That the people's direct exercise of their lawmaking authority deserves the highest First Amendment protections demonstrates that the question not yet decided in *Meyer v. Grant* should now be settled by this Court in this case. Supreme Court Rule 10(c).

The right of referendum respecting legislative enactments is secured by the people of 24 states. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1509 & n.22 (1990). Citizens of 21 states may enact ordinary legislation directly by initiative. *Id.* The large number of states whose citizens' rights of direct legislative power are threatened by the prospect of judicial encroachment such as that in the decision below is further reason why this case presents an "important question" which "should be settled by this Court." Supreme Court Rule 10(c). *See Simon & Schuster, Inc. v. New York Crime Board*, 502 U.S. 105, 115 (1991) (granting certiorari because "the Federal Government and most of the states have enacted statutes with similar objectives" such that "issue is significant and likely to recur").

This case does *not* raise the question whether a state may repeal provisions of its Constitution, or add new restrictions to rights of initiative and referendum through constitutional amendment, without offending the First Amendment.[7] Nor does the case require this Court to cast about without firm footings to establish a proper constitutional benchmark to secure protection of the citizens'

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[7] An amendment of the Washington Constitution requires approval of a majority of Washington's voters. Washington const. art. XXIII, § 1. Thus, only the people themselves can restrict this fundamental right. The reservation of the right of initiative and referendum was adopted as a constitutional amendment by the people of Washington in 1912 "because they had become impressed with the profound conviction that the Legislature had ceased to be responsive to the popular will." *Save Our State Park v. Hordyk*, 71 Wn. App. 84, 89, 856 P.2d 734 (1993) (citation omitted).

rights, for the proper standard is stated plainly in the Washington Constitution and Spokane City Charter.

Had the Washington court applied the standards stated plainly in the applicable provisions rather than create a new judicial rule allowing abridgment of referendum rights whenever the Legislature acted within its "police power," the court would have been acting consistently with this Court's First Amendment jurisprudence. If an action is "necessary for the immediate preservation of public peace, health, or safety," Spokane City Charter, § 19(a)(1), then the state would be well placed to demonstrate an "emergency" which provides "compelling justification" for denying a referendum. *Compare Simon & Schuster, Inc. v. New York Crime Board*, 502 U.S. at 120-21 (compelling state interest in compensating crime victims does not justify law limiting royalties to criminals because law did not further the interest); *Carey v. Brown*, 447 U.S. 455, 461 (1980) (no compelling justification for law prohibiting peaceful labor picketing of residences). It is noteworthy that the constitutional and charter standard here does not include the term "welfare," the broad term which almost always accompanies "public health and safety" in the boilerplate formulation of the scope of a government's police powers. *E.g., County of Spokane v. Valu-Mart, Inc.*, 69 Wn.2d 712, 716, 419 P.2d 993 (1966). These standards should be construed in accordance with their plain and ordinary meaning, especially because they are constitutional words. *See CLEAN v. State*, 130 Wn.2d at 826 & n.24, 928 P.2d at 1075 & n.4, *quoting* Story, *Commentaries on the Constitution of the United States*, § 451 (Thomas Cooley ed., 5th ed. 1891). *See also Save Our State Park v. Hordyk*, 71 Wn. App. at 91.

If the Washington court had given these words their plain and ordinary meaning as anyone who read the Washington Constitution or Spokane City Charter would understand them, it would have recognized that these words demand exacting judicial scrutiny before restriction of the right of referendum can be upheld. The Washington Constitution and Spokane City Charter already incorporated this Court's high standards for protection of core political speech. The Washington court's "basic fallacy" was its substitution of a much laxer standard which allowed abridgment of this fundamental right for virtually any reason the legislature might assert. *CLEAN v. State*, 130 Wn.2d at 830, 928 P.2d at 1078 (Sanders, J., dissenting).

A second and equally basic fallacy which goes to the heart of the First Amendment protection that should be provided here is the Washington court's extreme deference to the legislative declaration of emergency. Again, the dissenting and reluctantly concurring decisions below make clear that this deference is a new rule and not the misapplication of a properly stated rule of law. *E.g.*, App. A, *infra*, 24a (Durham, C. J., dissenting) ("this court has never granted such deference to a Legislature's conclusory assertion that an emergency exists"). *See also CLEAN v. State*, 130 Wn.2d at 828-29 & nn. 27-28, 928 P.2d at 1076-77 & nn.7-8 (majority's new rule of deference is contrary to principles of constitutional adjudication, quoting extensively from the *Federalist Number 78* and from *Marbury v. Madison*, 5 U.S. 137, 176-80 (1803)). This extreme deference is inconsistent with the "exacting scrutiny" courts must apply to state action which restricts core political speech. *See* App. A, *infra*, 38a (Durham, C.J.,

dissenting) (criticizing deference by majority here as "no different than deferring to a legislative declaration that an act were necessary to further a compelling status interest").

The Washington court's new rule of deference is particularly disturbing because such deference opens the door wide to abuse of the referendum right. Fifty years ago the Washington Supreme Court better appreciated this concern and "chided the Legislature for what it perceived was an attempt to thwart the people's constitutional right of referendum" by adopting a "custom of attaching emergency clauses to all sorts of bills, many of which cannot by any stretch of the imagination be regarded as actually emergent." *Save Our State Park v. Hordyk*, 71 Wn. App. at 90, n.6 (citation omitted). That court has now forgotten its own historical knowledge of the reasons for zealous judicial protection of the people's rights, as well as the rule itself. This Court's review is warranted to enable the Court to decide whether the First Amendment's protection of core political speech against such legislative (and now judicial) curtailment encompasses the exercise of initiative and referendum rights secured by a state's constitution.

VI. CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BRICKLIN & GENDLER, LLP

MICHAEL W. GENDLER
Counsel of Record for Petitioners

MAY, 1998

APPENDIX A

CLEAN (Citizens for leaders with Ethics and Accountability Now!), a Washington nonprofit corporation; Spokane Research & Defense Fund, a Washington nonprofit corporation; coalition for a new Spokane, a Washington non-profit corporation; Priorities First, a Washington political committee; Richard Adams, John Talbott, and Margaret Leonard, Appellants,

v.

CITY OF SPOKANE, a Washington first class charter city; the Spokane City Council; and Spokane Public Development Authority, a City of Spokane public corporation, Respondents,

and

Citizens Realty Company, a Washington corporation; and Lincoln Investment company, a Washington corporation, Respondents.

No. 65262-7.

Supreme Court of Washington,
En Banc.

Argued June 18, 1997.

Decided Nov. 13, 1997.

Eugster & Haskell, Stephen K. Eugster, Spokane, for Appellants.

Stanley M. Schwartz, Laurie Connelly, Asst. City Attys., Perkins, Coie, Thomas F. Kingen, Witherspoon, Kelley, Davenport & Toole, Duane M. Swinton, Spokane, for Respondents.

DOLLIVER, Justice.

CLEAN et al. challenge by direct review a Spokane ordinance providing public support for a new parking garage in downtown Spokane.

Respondents/Intervenors Citizens Realty Company and Lincoln Investment Company (Developers) own River Park Square shopping mall and garage in downtown Spokane. In early 1995, the Developers approached the City of Spokane (City) asking for assistance with the renovation and expansion of the mall parking garage as part of a plan to redevelop River Park Square (RPS). The redevelopment includes a new Nordstrom store to replace the existing store on which Nordstrom's lease will expire January 31, 1999. Nordstrom has not stated for the record whether it will remain downtown if the RPS project fails to materialize. Project proponents predict that the RPS redevelopment will create jobs, increase tax revenue, and improve cultural and recreational opportunities in downtown Spokane.

The Developers will renovate the parking garage and then sell it to the Spokane Downtown Foundation, a nonprofit corporation (Foundation). The Foundation intends to issue tax-exempt bonds on behalf of the City payable from garage revenues. The Foundation will lease the garage to the Spokane Public Development Authority (PDA), which will operate the facility. The Developers will lease the land to the Foundation and the Foundation will assign that lease to the PDA.

When the bonds issued by the Foundation are retired, the City will acquire ownership of the garage at no cost. The City has contingently pledged parking meter revenue to cover the garage operating expenses and the

ground lease payments in the event garage revenues are insufficient to meet the facility's expenses.

The City applied for an Economic Development Grant (EDI) and a section-108 guaranteed development loan from the United States Department of Housing and Urban Development (HUD). HUD has awarded the City a $1 million EDI grant. The section-108 loan application was still pending as of the date the Respondents' brief was submitted to this court. The City has pledged its future Community Development Block Grant funds to repay the section-108 loan if the Developers default.

The Developers submitted a State Environmental Policy Act (SEPA) checklist to the City. The City issued a Mitigated Determination of Nonsignificance for the project on July 2, 1996. This decision was not appealed administratively.

On January 27, 1997, the Spokane City Council approved Ordinance C31823 (the Ordinance) which authorizes City support for the RPS garage. On January 30, 1997, Appellant Priorities First presented a referendum petition to the Spokane City Clerk, seeking to overturn the Ordinance. Although referendum proponents collected over 8,000 signatures, the City refused to honor the referendum petition because the City Council declared that an emergency existed when it adopted the Ordinance, rendering the Ordinance effective immediately and precluding a referendum.

CLEAN et al. (Appellants) brought this action in Spokane County Superior Court to challenge several aspects of the City and PDA's participation in the project, seeking declaratory and injunctive relief. The trial court

granted summary judgment to the City, PDA and Developers (Respondents). This court granted direct review on May 9, 1997.

The standard of review of a trial court's order granting summary judgment is de novo. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate where the parties' pleadings, affidavits, and depositions establish that there are no genuine issues of material fact and that the movant is entitled to a judgment as a matter of law. *Wilson*, 98 Wash.2d at 437, 656 P.2d 1030. When considering a motion for summary judgment, the court shall consider the evidence in the light most favorable to the nonmoving party. *Wilson*, 98 Wash.2d at 437, 656 P.2d 1030.

(1) Has the City acted in excess of its municipal authority under the off-street parking statutes – RCW 35.86.050 and RCW 35.86.010?

Appellants first argue the City violated RCW 35.86.050 because it failed to develop a comprehensive parking plan before enacting the Ordinance. The statute provides:

> In the establishment of off-street parking space and/or facilities, cities shall proceed with the development of the plan therefor by making such economic and physical surveys as are necessary, shall prepare comprehensive plans therefor, and shall hold a public hearing thereon prior to the adoption of any ordinances relating to the leasing or acquisition of property. . . .

RCW 35.86.050.

Respondents correctly observe that the statute does not discuss the level of specificity required of a comprehensive plan. The only case interpreting RCW 35.86.050 is *In re Petition of City of Auburn*, 65 Wash.2d 560, 398 P.2d 723 (1965). In *City of Auburn*, this court observed that, "there seem to be no guiding principles for the preparation of 'comprehensive plans.' " 65 Wash.2d at 563, 398 P.2d 723. Respondents argue that, if the Legislature had so intended, it could have prescribed a very specific set of criteria for municipalities to follow when preparing comprehensive plans under RCW 35.86.050, as is evidenced by the specificity called for in the Growth Management Act (RCW 36.70A.070).

Lacking case law interpreting the level of specificity required by this particular statute, the trial court relied by analogy upon *Hutchinson v. Port of Benton*, 62 Wash.2d 451, 383 P.2d 500 (1963). In *Hutchinson*, we held the Port of Benton had satisfied a statutory requirement that it adopt a comprehensive harbor development plan before expanding the port because it had given "a fairly detailed picture" of what the project entailed. *Hutchinson*, 62 Wash.2d at 457, 383 P.2d 500. We acknowledged that the plan was not a "model of preciseness," but upheld the project because the plan was sufficient to inform the taxpayers of how their money was to be spent. *Hutchinson*, 62 Wash.2d at 457, 383 P.2d 500.

The trial court in this case held the City had complied with RCW 35.86.050 because the statute does not require a specific checklist but rather a process that provides the public with specific information about the project. Because the City commissioned both a parking study and a financial feasibility study and held three public

hearings to elicit comments on the plan, the trial court found the City had complied with RCW 35.86.050.

Respondents point out that, in addition to these measures, the City has adopted a Downtown Spokane Development Plan (Plan), which addresses downtown parking needs. In their Reply Brief, the Appellants claim the RPS facility violates this Plan because the Plan calls for parking at the Davenport Hotel. This assertion is false. The Plan encourages the development of a parking facility "near" the Davenport Hotel and the Opera House/Convention Center. Ex. 6 at 13. The RPS garage is two blocks to the north of the Davenport Hotel.

Appellants' argument that the City violated RCW 35.86.050 is not persuasive. The City has held hearings and commissioned studies for the project and has also established that the facility conforms to the City's comprehensive plan. These steps satisfy the requirements of RCW 35.86.050, given case law defining "comprehensive plan."

Appellants also contend the City lacks the authority to purchase the parking garage because the RCW requires city parking facilities to serve, as their primary purpose, persons who use the park or civic center facilities. RCW 35.86.010 states:

> Cities . . . are authorized to provide off-street parking space and facilities located on land dedicated for park or civic center purposes, or on other municipally-owned land where the primary purpose of such off-street parking facility is to provide parking for persons who use such park or civic center facilities. In addition a city may own other off-street parking facilities

and operate them in accordance with RCW 35.86A.120.

Appellants' argument is without merit. The second sentence of RCW 35.86.010 plainly authorizes a city to own "other off-street parking facilities." Appellants contend that, because this portion of the statute requires such facilities to be *operated* in accordance with RCW 35.86A.120 and because chapter 35.86A RCW allows cities to establish parking commissions, the City is not allowed to own "other off-street parking" unless it has created a parking commission. RCW 35.86.010 merely states that such facilities must be *operated* in accordance with RCW 35.86A.120 (which specifies under which circumstances a city may or may not operate one of its parking facilities), not that such a facility can be acquired only after a city appoints a parking commission. The trial court properly found the City was not required to create a parking commission as a prerequisite to owning the RPS garage.

(2) ***Has the City failed to comply with the State Environmental Policy Act?***

The Developers submitted an environmental checklist to the City as required by the State Environmental Policy Act (SEPA) (RCW 43.21C). The City issued a Mitigated Determination of Non-significance on July 2, 1996. Appellants sought review of this determination in superior court. The trial court barred the SEPA claim after finding that Appellants failed to appeal the City's determination through administrative channels.

A plaintiff alleging noncompliance with SEPA must exhaust administrative remedies before filing suit. *Citizens for Clean Air v. City of Spokane*, 114 Wash.2d 20, 26, 785 P.2d 447 (1990). Where an agency has an appeal procedure in place, an aggrieved person is required to seek redress under that procedure before seeking judicial review. RCW 43.21C.075(4). The City of Spokane has adopted a specific administrative appeal process for SEPA rulings. *See* Spokane Municipal Code (SMC) 11.10.170.

Appellants fail to prove or even allege they have done anything to exhaust their administrative remedies. There is no evidence in the record that Appellants filed an administrative appeal. Where the record fails to show that an aggrieved party has attempted to use the administrative appeals process, the court will conclude that no appeal was made. *Citizens for Clean Air*, 114 Wash.2d at 27, 785 P.2d 447. The trial court therefore properly dismissed the SEPA claim.

(3) Has the City failed to comply with the Growth Management Act?

Appellants assert the City has violated the Growth Management Act (RCW 36.70A.120) by failing to follow its comprehensive plan. The City responds it has yet to adopt a comprehensive plan under the Growth Management Act (the Act) and, therefore, cannot have violated the Act. The trial court agreed and adopted the City's reasoning without elaboration.

The Growth Management Act requires first-class cities to implement comprehensive plans by July 31, 1997.

RCW 35.22.695. As of the date of oral argument, Spokane had yet to implement a comprehensive plan under the Act. Because there is no plan in place to violate, the City cannot be said to have violated the Act.

(4) Has the City failed to comply with its comprehensive plan?

Without citing to a specific ordinance, Appellants also contend the City has violated its existing comprehensive plan. Spokane adopted a comprehensive plan in 1983. *See* chapter 11.20 SMC. The plan allows for a broad range of activities downtown. Appellants argue the RPS redevelopment project violates the comprehensive plan's arterial street plan because it would close Post Street, an arterial.

The City responds that Appellants have identified no section of the arterial street plan that would prohibit the vacation of an arterial. The City contends the RPS project actually furthers the Spokane comprehensive plan because the plan encourages development of projects that attract shopping and entertainment in the downtown area. The City is correct. The Appellants have failed to allege any genuine violation of the Spokane comprehensive plan.

(5) Has the City violated the Clean Air Act?

Appellants next assert the RPS project violates the Washington Clean Air Act (RCW 70.94) because the City has not obtained an air quality conformity determination. Although Appellants do not cite which portion of the

statute the City is allegedly violating, they are presumably referring to RCW 70.94.037, which would prevent the City from approving the RPS project without first certifying that the project conforms to the State implementation plan of the federal Clean Air Act. The Respondents claim that project developers prepared an air quality analysis as part of the SEPA review process, and that this analysis concluded that the project and its mitigation measures will actually reduce carbon monoxide emissions.

Appellants' argument is completely without merit. The Developers prepared an air quality analysis (Ex. 85 at 01805-01822), and the City determined the project conformed to the Clean Air Act.

(6) Does the Ordinance violate article VII, section 1, of the Washington Constitution by failing to serve a public purpose?

Appellants next argue the RPS project violates article VII, section 1 (amend.81), of the Washington Constitution, which states that all taxes "shall be levied and collected for public purposes only." Appellants contend the RPS garage does not serve a public purpose because its expansion is designed solely to meet the retail shopping needs of the renovated RPS, a private entity.

We recently addressed this issue in *CLEAN v. State*, 130 Wash.2d 782, 792-93, 928 P.2d 1054 (1996). In *CLEAN*, we held that public development of a major league baseball stadium serves a public purpose even though the Seattle Mariners baseball club, a private entity, would also benefit from the expenditure of public funds.

CLEAN, 130 Wash.2d at 792-97, 928 P.2d 1054. We explained:

> "An expenditure is for a public purpose when it confers a benefit of reasonably general character to a significant part of the public." *In re Marriage of Johnson*, 96 Wash.2d 255, 258, 634 P.2d 877 (1981). "Where it is debatable as to whether or not an expenditure is for a public purpose, we will defer to the judgment of the legislature." *Anderson v. O'Brien*, 84 Wash.2d 64, 70, 524 P.2d 390 (1974).
>
> . . . .
>
> The fact that private ends are incidentally advanced is immaterial to determining whether legislation furthers a public purpose.

CLEAN, 130 Wash.2d at 793 & 796, 928 P.2d 1054 (citation omitted). We acknowledged in *CLEAN* that the degree to which the baseball stadium would improve the economy and quality of life was "debatable," but held that this question was best resolved by the people's elected representatives. *CLEAN*, 130 Wash.2d at 796-97, 928 P.2d 1054.

We must therefore defer to the judgment of the Spokane City Council if the public benefit of this project is at least "debatable." The Ordinance contains at least 10 separate paragraphs articulating the reasons why the project will benefit Spokane and meet a public need. Based upon studies, documents, and public testimony, the City found the project would create jobs, stimulate the economy, provide cultural opportunities, increase tax revenue, thwart the economic decline of the downtown area, and improve the quality of life. Given the fact that the City

relied upon evidence that the project would confer various benefits, the public benefit of this project is at least debatable. The project meets the public purpose test of article VII, section 1, of the Washington Constitution.

(7) Does the Ordinance constitute a gift or a loan of the credit of the State in violation of article VIII, section 7, of the Washington Constitution?

Appellants next contend the RPS project amounts to a gift of public funds and a lending of credit in violation of the Washington Constitution. Respondents assert that public support for the project does not constitute a gift or a lending of credit because the City will receive a parking garage in exchange for its assistance.

Article VIII, section 7, of the Washington Constitution states:

> No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm. . . .

Appellants claim the City is violating this constitutional provision in three ways: (a) the garage lease and ground lease payments to be paid to the Developers are excessively high, and the difference between the negotiated prices and the market prices amounts to an unconstitutional gift; (b) HUD assistance to the Developers is an unconstitutional gift; (c) the pledge of parking meter revenues is an unconstitutional lending of credit. Because

the HUD assistance comes from the federal government, not the City or State, this claim is meritless on its face.

CLEAN v. State employed a two-part test for analyzing potential violations of article VIII, section 7. *CLEAN*, 130 Wash.2d at 797, 928 P.2d 1054. First, the court asks if the funds are being expended to carry out a fundamental purpose of the government. If the answer to this question is yes, then no gift of public funds has been made. If not, the court focuses on the consideration received by the public and the donative intent of the appropriating body. *CLEAN*, 130 Wash.2d at 798, 928 P.2d 1054.

Because it is highly questionable that the building of a parking garage for a business district serves a "fundamental purpose" of government, we turn to the second prong of the *CLEAN* test – whether there was consideration or donative intent. We addressed this issue in *City of Tacoma v. Taxpayers*, 108 Wash.2d 679, 703, 743 P.2d 793 (1987):

> "Unless there is a proof of donative intent *or* a grossly inadequate return, courts do not inquire into the adequacy of consideration." (Italics ours.) *Adams* [*v. University of Wash.*, 106 Wash.2d 312, 327, 722 P.2d 74 (1986)]. . . . Absent a showing of donative intent or gross inadequacy, trial courts should only apply a legal sufficiency test, under which a bargained-for act or forbearance is considered sufficient consideration.

Appellants fail to prove either that the City intended to donate public funds to the Developers or that the consideration received for the City's participation in the project is "grossly inadequate." In exchange for its assistance, the City will receive a parking garage – an item

that would unquestionably constitute legally sufficient consideration. Although Appellants may view the transaction as an unwise use of public funds that unduly benefits the Developers, the wisdom of the plan is not for this court to consider. *See Louthan v. King County*, 94 Wash.2d 422, 427, 617 P.2d 977 (1980).

Appellants next argue that, even if this court finds the lease payment arrangement is not an unconstitutional gift, we should still hold that the contingent pledge of parking meter revenue is an unconstitutional lending of credit. Again, *CLEAN v. State* is directly on point. The appellants in *CLEAN* argued that the Stadium Act amounted to an unconstitutional lending of credit because it was a " 'financing conduit for private enterprise.' " *CLEAN*, 130 Wash.2d at 799, 928 P.2d 1054. We rejected this argument on the basis that the stadium was to remain in public hands. In so holding, we distinguished the case from *Lassila v. City of Wenatchee*, 89 Wash.2d 804, 576 P.2d 54 (1978), in which we struck down the City of Wenatchee's purchase of property with intent to sell it to a private party. *CLEAN*, 130 Wash.2d at 799, 928 P.2d 1054. Because the City of Wenatchee in Lassila received nothing of value for its expenditure of public money, it was unconstitutionally acting as a "middle person for a private enterprise." *CLEAN*, 130 Wash.2d at 799, 928 P.2d 1054. The Stadium Act, in contrast, provided that ownership of the facility would remain in public hands. *CLEAN*, 130 Wash.2d at 799, 928 P.2d 1054. Because the State was not acting as a financing conduit for a private entity, the Stadium Act did not amount to an unconstitutional lending of credit. *CLEAN*, 130 Wash.2d at 799, 928 P.2d 1054.

Because the RPS facility will ultimately belong to the City, the City's pledge of parking meter revenues is not an unconstitutional lending of credit under *CLEAN*. The pledge is clearly not a financing conduit for a private entity because it was made to the PDA, a public entity, for the sake of a publicly-owned facility.

(8) Is the emergency clause of the Ordinance invalid?

When the Ordinance was adopted, the City Council found that "an urgency and emergency exists," and accordingly declared the Ordinance "effective upon adoption in order to preserve the public peace, health or safety and provide support of the City government and its existing public institutions, facilities and infrastructure." Ex. 142 at 10. The fact that the Ordinance became effective immediately precluded a referendum on the project under section 83 of the Spokane City Charter, which allows for a referendum where the requisite number of signatures are presented to the City "prior to the date when any ordinance shall take effect."

Section 19(a) of the Spokane City Charter provides that certain ordinances "shall take effect immediately upon passage," including:

> An ordinance necessary for the immediate preservation of the public peace, health or safety or for the immediate support of city government and its existing public institutions; provided it has in its preamble or body a statement of the facts giving rise to the necessity for immediate

> effectiveness and it is passed by a vote of one more than a majority of the council[.]

Spokane City Charter § 19(a)(1).

Appellants argue the emergency clause of the Ordinance is invalid and that therefore a referendum is required. Again, *CLEAN v. State* is directly on point. In *CLEAN*, this court interpreted article II, section 1(b) (amend. 72), of the Washington Constitution, which subjects all state legislation to referendum except laws that are "necessary for the immediate preservation of the public peace, health or safety." Given that section 19 of the Spokane City Charter is identical in relevant part to the constitutional provision interpreted in *CLEAN*, *CLEAN* is controlling.

When reviewing legislative declarations of emergencies, we give substantial deference to the Legislature. " 'Legislative declarations of fact, such as the existence of an emergency, are deemed conclusive unless they are "obviously false and a palpable attempt at dissimulation." ' " *CLEAN*, 130 Wash.2d at 808, 928 P.2d 1054 (quoting *City of Tacoma v. Luvene*, 118 Wash.2d 826, 851, 827 P.2d 1374 (1992)). Where an act is "doubtful" in this regard, the doubt will be resolved in favor of the declaration of emergency. *CLEAN*, 130 Wash.2d at 808, 928 P.2d 1054. In CLEAN, we found the emergency clause of the Stadium Act was valid because the Legislature was acting on a "clear and present danger" that the Seattle Mariners would leave the state. *CLEAN*, 130 Wash.2d at 808, 928 P.2d 1054. Since the Legislature could reasonably believe such a result would produce a detrimental economic

effect, we deferred to the Legislature's declaration of emergency. *CLEAN*, 130 Wash.2d at 808-09, 928 P.2d 1054.

Appellants assert *CLEAN v. State* is inapposite because there is no proof in the record that Nordstrom will leave downtown if the project does not go forward. It is true that Respondents have failed to establish Nordstrom will leave downtown Spokane if the RPS project fails to materialize. Nevertheless, *CLEAN v. State* requires this court to defer to the City Council's emergency declaration unless it is "obviously false and a palpable attempt at dissimulation." *CLEAN*, 130 Wash.2d at 808, 928 P.2d 1054 (quoting *Luvene*, 118 Wash.2d at 851, 827 P.2d 1374).

The City Council found, among other things, that downtown Spokane has "experienced a serious economic decline." Ex. 142 at 4. The Council also found that the RPS project would create jobs, stimulate the economy, provide cultural opportunities, and improve the quality of life in the downtown area. Ex. 142 at 4. The Council further found that commitments from the City and from prospective RPS tenants "must immediately be received" by the Developers in order for the project to be completed on time. Ex. 142 at 5. Because the viability of the RPS project depends upon Nordstrom's presence and the project must begin construction in September 1997 to accommodate the expiration of Nordstrom's lease in 1999, it was arguably necessary for the City to render the Ordinance effective immediately. We cannot say the City's declaration of emergency is either "obviously false," or a "palpable attempt at dissimulation."

(9) Has the City violated City Charter section 85 by failing to honor the petition for a referendum?

Appellants next contend the City has violated Spokane City Charter § 85(a), which requires all "capital expenditures . . . requiring indebtedness of the taxpayers" to be approved by a vote of the people. However, section 85(a) exempts "expenditures of an emergency nature" from the referendum requirement. Because we have upheld the declaration of emergency, the RPS project is exempt from section 85 of the charter.

(10) Has the City acted in excess of its authority under RCW 35.21.730 by contracting with the PDA to operate the garage?

Appellants also claim the PDA lacks the authority to lease and operate the garage. RCW 35.21.730 allows cities to create public corporations "to improve the administration of authorized federal grants or programs, to improve governmental efficiency and services, or to improve the general living conditions in the urban areas. . . . " Appellants argue the PDA lacks the authority to exist because it serves none of these functions. However, the PDA will undeniably facilitate the administration of the federal EDI grant. It arguably serves the other two purposes as well. Therefore, the City has not acted in excess of RCW 35.21.730.

Appellants also contend the PDA is in violation of RCW 35.21.730(4), which sets forth three potential functions for a PDA: to administer federal grants, receive private assistance, and perform any lawful public purpose. Appellants argue the Spokane PDA is violating this

portion of the law because, worded conjunctively, the statute requires a PDA to perform all three of these functions. This argument is meritless. The plain language of the statute states that a city "may" create a public corporation for these varied purposes. Although it is true the word "and" appears in the statute, all three statutory elements need not be present for a PDA to be acting lawfully. *Mount Spokane Skiing Corp. v. Spokane County*, 86 Wash.App. 165, 173, 936 P.2d 1148 (1997).

(11) Has the City improperly delegated its authority?

Appellants assert without explanation that the City has improperly delegated its authority "to consummate the transactions" identified in the Ordinance. Br. of Appellants at 55. Appellants fail to identify to whom the City has improperly delegated its authority and failed to clarify this point in their Reply Brief, despite the fact that Respondents argued Appellants' argument was unclear. Lacking this basic information, we are unable to address this claim.

(12) Did the trial court err in allowing the Developers to intervene in this case?

Appellants next argue the trial court improperly allowed the Developers to intervene. CR 24(a)(2) allows an interested party to intervene as a matter of right where "the disposition of the action may . . . impair . . . his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Respondents contend that the Developers' interests will not necessarily be protected by the City and the PDA because the interests of the Developers are distinct from those of the City and the PDA. The Respondents reason that, whereas the City is charged with representing the interests of all its residents, the Developers represent a more narrow private interest. Given that the disposition of this action could most certainly impair the Developers' ability to protect their interests, the trial court did not err in allowing the Developers to intervene.

(13) Did the trial court err in exempting from public disclosure an addendum to a report prepared by Coopers & Lybrand?

Appellants also claim the trial court erred in sealing an addendum to a report prepared for the City by Coopers & Lybrand. After reviewing the documents in camera the trial court refused to compel the City to produce the information, finding it was exempt from the scope of the Public Records Act, RCW 42.17.310. RCW 42.17.310(1)(r) exempts from public disclosure "[f]inancial and commercial information and records supplied by businesses or individuals . . . during application for economic development loans or program services provided by any local agency."

Where the record consists solely of documentary evidence, the standard of review of a trial court's public disclosure ruling is de novo. *Dawson v. Daly*, 120 Wash.2d 782, 788, 845 P.2d 995 (1993). The trial court did not err in exempting the addendum from public disclosure. The addendum is exempt from disclosure under RCW

42.17.310(1)(r) because the project's HUD loan was pending at the time the trial court made its ruling.

(14) Are Appellants entitled to attorney fees?

Appellants ask this court to "fashion a new equitable standard for attorneys ['] fees in proceedings of this kind." Br. of Appellants at 57. We decline to do so.

Affirmed.

SMITH, JOHNSON, ALEXANDER and TALMADGE, JJ., concur.

GUY, Justice (concurring).

I concur in the result of the majority opinion. I write separately to explain my position on the issue regarding the emergency clause of the Spokane City Charter. While I dissented in *CLEAN v. State,* 130 Wash.2d 782, 928 P.2d 1054 (1996), concerning the Stadium Act and whether raising money for the building of a new baseball stadium was an "emergency," I lost that issue. I now defer to the decision of the majority on this issue. If the funding of a new stadium for the Mariners was valid emergency legislation, then a legislative body's conclusion that the redevelopment and revitalization of a downtown area may also be such legislation. The majority of this Court essentially held in the Mariner's case that the economic welfare of a region may give rise to the kind of "emergency" for which emergency legislation may be validly used. Therefore, we held that when a legislative body decides that the economic welfare of a region is an emergency in a given setting, then the majority of this court will defer to the judgment of that legislative body.

I also write separately to disagree with the conclusion of the dissent that the danger to be remedied in Spokane is not emergent because "the economic decline has already happened." That is not so. Elected officials have a duty to strive to keep alive the economic vitality of their city. The downtown of Spokane is the center of that city and surrounding area. To allow a downtown to lose its business activity is to allow its people to lose their sense of belonging to the community. It is within the duty of city officials to attempt to keep their downtown safe, convenient and economically healthy.

MADSEN, Justice (concurring in the majority).

I agree with Durham, C.J., dissenting, that prior to *CLEAN v. State*, this Court repeatedly and consistently held in its review of emergency legislation under Const. art. II, § 1(b) that "the declaration to which deference is granted [by the Court] is not the assertion of an emergency itself, but the declaration of the facts constituting the emergency." Dissent at 1180, 1181. However, *CLEAN v. State* dramatically altered judicial review. This Court declared in CLEAN that it will defer to the assertion of an emergency as long as the facts relied upon by the Legislature in declaring an emergency are not " 'obviously false and a palpable attempt at dissimulation.' " *City of Tacoma v. Luvene*, 118 Wash.2d 826, 851, 827 P.2d 1374 (1992) (quoting *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 257, 23 P.2d 1 (1933)).

After *CLEAN*, this Court no longer conducts an independent analysis of whether a law is necessary for the immediate preservation of the public peace, health, or safety within the meaning of Const. art. II, § 1(b). The

emergency exception is now coextensive with police powers. I consider this an unfortunate reading of the State Constitution. However, because *CLEAN* is the law, I must concur with the majority in its result in this case.

SANDERS, Justice (concurring).

Reluctantly I concur with the majority. My greatest reluctance is with issue seven (Majority at 1174) regarding unconstitutional gifts of public funds and issues eight and nine (Majority at 1175-1176) which grant this court's imprimatur to the preposterous notion that a new parking garage for Nordstrom's is "necessary for the immediate preservation of the public peace, health or safety. . . . " Spokane County Charter art. III, § 19(a)(1); *compare* Const. art. II, § 1(b). But this result is compelled by the majority decision in *CLEAN v. State*, 130 Wash.2d 782, 928 P.2d 1054 (1996) wherein this court virtually repealed the citizens' constitutional right to referendum by allowing the Legislature to inoculate itself against referendums through conclusory emergency clauses not subject to meaningful judicial review, as well as *King County v. Taxpayers of King County*, 132 Wash.2d 360, 938 P.2d 309 (1997) which emasculated Const. art. VIII, § 7's prohibition against gifts of public funds to private persons by adopting a "legally sufficient" consideration test. *See* Majority at 1175. *Compare Taxpayers*, 132 Wash.2d at 393, 938 P.2d 309 (Sanders, J., dissenting). As my objections to both decisions were stated for naught in the accompanying dissents, I concur this case is within the four corners of those majorities and agree stare decisis requires like result in all other cases unless or until these decisions are appropriately overruled to restore that measure of constitutional protection our citizens are justly entitled.

I agree with all of the observations set forth by the Chief Justice in her dissenting opinion, save and except her effort to distinguish *CLEAN v. State*, which, in my judgment, is fairly indistinguishable. Once the constitutional well has been poisoned, we all must drink from it lest the incentive to correct our mistakes in a principled fashion be lost by inconsistently imposing them.

DURHAM, Chief Justice (dissenting).

I disagree with the majority regarding the validity of the declaration of emergency in the Spokane ordinance at issue. Relying on *CLEAN v. State*, 130 Wash.2d 782, 928 P.2d 1054 (1996), the majority concludes that a bare legislative assertion of an emergency, unless obviously false, forecloses the people's referendum right. This court has never granted such deference to a Legislature's conclusory assertion that an emergency exists. Rather, deference is granted only to the declaration of facts that constitute the alleged emergency. It remains a judicial question whether those facts indeed constitute an emergency. Because the Spokane ordinance responds only to a continuing problem of economic decline in the downtown retail area, it cannot be said to address an emergent threat. It therefore fails to state an emergency and should be subject to referendum.

ANALYSIS

The majority relies on some language from *CLEAN v. State* that at first blush seems to foreclose any inquiry into the validity of a legislative declaration of emergency: " ' "Legislative declarations of fact, such as the existence of

an emergency, are deemed conclusive unless they are 'obviously false and a palpable attempt at dissimulation.' " ' "[1] This language, however, must be considered in light of its application in the cases from which it was born. As the forthcoming discussion illustrates, similar language has been used in many of our emergency clause cases.[2] Notwithstanding such broad language of deference, however, this court has routinely invalidated legislative declarations of emergency. We have done so without ever concluding that the Legislature had falsely declared an emergency. This would not be possible were deference granted, as the majority mistakenly believes, to the mere legislative assertion that an emergency exists.

SUMMARY OF OUR EMERGENCY CLAUSE CASES

Were it the case that courts must defer to a declaration of emergency itself, courts would never need to

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[1] Majority at 1176 (quoting *CLEAN v. State*, 130 Wash.2d, 782, 808, 928 P.2d 1054 (1996) (quoting *City of Tacoma v. Luvene*, 118 Wash.2d 826, 851, 827 P.2d 1374 (1992) (quoting *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 23 P.2d 1 (1933)))).

[2] There are two separate exceptions to the people's referendum right: one for laws necessary for the immediate preservation of the public peace, health, or safety; and another for laws in support of the state government and its existing public institutions. *See CLEAN v. State*, 130 Wash.2d at 804 n. 7, 928 P.2d 1054 (discussing Const. art. II, § 1(b)). Since this case involves application of the first exception only, my discussion of our relevant case law will be confined to those emergency clause cases addressing the first exception. As the majority correctly points out, the standard for evaluating declarations of emergency in state legislation is equally applicable to the city ordinance in the present case.

discuss the factual bases for legislation absent allegations of legislative deceit. Legislative declarations of emergency would rarely, if ever, be contested since the Legislature would need only declare an emergency to foreclose virtually any challenge. Instead, deference has been granted only to the legislative declaration of *facts constituting the emergency*. This point was expressly made in *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 23 P.2d 1 (1933), which is the original source of the language in *CLEAN v. State* regarding the conclusive nature of legislative declarations of emergency.[3]

In *Hamilton*, this court considered the validity of declarations of emergency in two depression-era acts providing relief in response to state-wide unemployment and poverty.[4] The Legislature declared that " '[d]iscontent, social unrest and incipient insurrection exist. Acts of insurrection are occurring.' "[5] The appellant did not argue that insurrection was insufficiently emergent to suspend the referendum right. Rather, the appellant disputed the Legislature's factual assertion that there was such a degree of social unrest. The court made clear that the courts will defer to legislative declarations of facts constituting an emergency:

> We have always held to the rule that the legislative declaration of the *facts constituting the emergency* is conclusive, unless, giving effect to

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[3] *See supra* note 1.

[4] *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 251-54, 23 P.2d 1 (1933).

[5] *Hamilton*, 173 Wash. at 256-57, 23 P.2d 1 (quoting Rem.Stat. § 9992 (Supp.1933)).

> every presumption in its favor, the court can say that such legislative declaration, on its face, is obviously false and a palpable attempt at dissimulation.[6]

Having given conclusive effect to the legislative declaration that insurrection was occurring, it was a simple matter for the court to conclude that insurrection was a sufficiently emergent threat to justify suspension of the referendum right.[7]

In the next three emergency clause cases, the court affirmed this principle by taking legislative declarations of the facts at face value. Yet, the court gave no conclusive effect to the declarations of emergency themselves. Instead, the court invalidated the declarations of emergency in all three cases because the factual bases for the alleged emergencies were not emergent.

First, in *State ex rel. Robinson v. Reeves*, 17 Wash.2d 210, 135 P.2d 75, 146 A.L.R. 280 (1943), the court considered the validity of a declaration of emergency in an act relating to public utilities funding and operations. In holding the declaration of emergency invalid, the court emphasized that the referendum power is suspended only upon an immediate threat to the public peace, health, or safety.[8] The court concluded that the acquisition and operation of public utilities, while in the public

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[6] *Hamilton*, 173 Wash. at 257, 23 P.2d 1 (emphasis added).

[7] *Hamilton*, 173 Wash. at 259, 23 P.2d 1.

[8] *State ex rel. Robinson v. Reeves*, 17 Wash.2d 210, 215-16, 135 P.2d 75 (1943).

interest, was not an emergency, notwithstanding the Legislature's declaration that it was.[9]

> "Promotion of the public welfare" is not a criterion by which we may be guided in determining whether or not an emergency exists which defeats the right to refer the act to the people. . . .
>
> . . . .
>
> To uphold a legislative declaration of emergency such as this would destroy the referendum and would permit the legislature, or a group of electors barely sufficient to invoke an initiative, to impose its will upon the majority in any instance where it is seen fit to attach to an act a declaration of emergency.[10]

Next, in *State ex rel. McLeod v. Reeves*, 22 Wash.2d 672, 157 P.2d 718 (1945), the court invalidated a declaration of emergency in an act amending the game code. The court rejected the suggestion that the amendments were emergency measures necessary to correct an alleged constitutional problem with the then existing code.[11] Again, the court emphasized that it is a judicial question whether the factual bases for legislation constitute an emergency.[12] The court concluded that the need to reorganize the game

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[9] *Robinson*, 17 Wash.2d at 216-17, 135 P.2d 75.

[10] *Robinson*, 17 Wash.2d at 217, 135 P.2d 75.

[11] *State ex rel. McLeod v. Reeves*, 22 Wash.2d 672, 675, 157 P.2d 718 (1945).

[12] *McLeod*, 22 Wash.2d at 674, 157 P.2d 718.

commission was not sufficiently emergent to suspend the referendum right.[13]

Then, in *State ex rel. Kennedy v. Reeves*, 22 Wash.2d 677, 157 P.2d 721 (1945), the court invalidated a declaration of emergency in an act regarding the administration of state timber resources. The court rejected arguments that the act was immediately necessary as an economic measure to quash duplicative timber management functions and to consolidate control over timber resources.[14] The court expressly held that the referendum right could not be defeated by the mere declaration of emergency:

> We think it too clear to require argument that the legislature cannot defeat the constitutional right, reserved by the people . . . by *merely* inserting in an act. . . .
>
> "This act is necessary for the immediate preservation of the public peace, health and safety. . . . "[15]

Notwithstanding the beneficial nature of the act, it did not address an emergent threat and was, therefore, subject to referendum.[16]

This brings us to *State ex rel. Pennock v. Reeves*, 27 Wash.2d 739, 179 P.2d 961 (1947), in which the court erroneously stated in dictum that conclusive effect is

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[13] *McLeod*, 22 Wash.2d at 674-75, 157 P.2d 718.

[14] *State ex rel. Kennedy v. Reeves*, 22 Wash.2d 677, 682-83, 157 P.2d 721 (1945).

[15] *Kennedy*, 22 Wash.2d at 681, 157 P.2d 721 (quoting Laws of 1945, ch. 202, p. 579) (emphasis in original).

[16] *Kennedy*, 22 Wash.2d at 682-84, 157 P.2d 721.

given to a legislative declaration of emergency itself. In *Pennock*, the plaintiff sought a writ of mandate to compel the Secretary of State to accept filings for referendum against parts of two amendatory welfare acts. The court held, on the only issue before it, that when any portion of a law addresses an emergency, the entire law is immune from referendum.[17] Since the plaintiff conceded that the appropriations provisions of the acts were emergent and in support of an existing state institution,[18] his writ was necessarily denied. Yet, the court went on to state in dictum:

> In each of the statutes in the cases at bar is a declaration that the act is necessary for the immediate preservation of the public peace, health, and safety. We have consistently held that such legislative declaration of emergency and necessity for the enactment is conclusive and must be given effect, unless the declaration on its face is obviously false; and, in determining the truth or falsity of the legislative declaration, we will enter upon no inquiry as to the facts, but must consider the question from what appears upon the face of the act, aided by the court's judicial knowledge. *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 23 P.2d 1. We must give to the action of the legislature and its declaration of an emergency every favorable presumption.[19]

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[17] *State ex rel. Pennock v. Reeves*, 27 Wash.2d 739, 743, 179 P.2d 961 (1947).

[18] *Pennock*, 27 Wash.2d at 741, 179 P.2d 961.

[19] *Pennock*, 27 Wash.2d at 743-44, 179 P.2d 961.

In doing so, the court misstated the rule it cited from *Hamilton*. As discussed earlier, the *Hamilton* court stated that the court had always given conclusive effect to legislative declarations of *facts constituting an emergency*, and the *Kennedy* court expressly rejected the suggestion that the declaration of emergency itself was given conclusive effect.

Fortunately, there is no precedential effect to this misstatement because the doctrine of stare decisis does not apply to language that is unnecessary to the conclusion reached.[20] It is well established that the precedential effect of such general statements is confined to the facts and issues before the court.[21] The plaintiff never challenged the validity of the declarations of emergency; indeed, he conceded their validity. He sought only to subject the nonemergency provisions of the acts to referendum. Thus, the court's misstatement, though often repeated, is not binding authority.

Unfortunately, this court has often turned, ill advisedly, to *Pennock* for the scope of judicial deference in emergency clause cases. However, subsequent emergency clause cases purporting to apply this rule from *Pennock*, up to and including *CLEAN v. State*, make clear that the declaration of emergency itself is given no conclusive effect. Rather, in order for the court to uphold the validity of a declaration of emergency, there must be facts that are legally sufficient to constitute an emergency. This court

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[20] *In re Electric Lightwave, Inc.*, 123 Wash.2d 530, 541, 869 P.2d 1045 (1994).

[21] *In re Estate of Burns*, 131 Wash.2d 104, 113, 928 P.2d 1094 (1997).

has not hesitated to hold legislation subject to referendum despite a legislative declaration of emergency when the facts did not demonstrate an emergent threat to the public.

In the next emergency clause case after *Pennock*, this court struck down a declaration of emergency in a city ordinance much like the present one. At issue in *State ex rel. Gray v. Martin*, 29 Wash.2d 799, 189 P.2d 637 (1948) was a Tacoma ordinance authorizing the purchase of property to construct a municipal airport. The ordinance stated that a public emergency existed and that in order to provide adequate transportation facilities it was imperative that the ordinance take effect immediately. Like the Spokane charter in the present case, the Tacoma charter provided for suspension of the referendum right upon a declaration of emergency in an ordinance. The City argued that the declaration of emergency was conclusive since it was not obviously false on its face and there were no judicially noticeable facts indicating falsity.[22] The ordinance at issue provided in relevant part:

> Section 4. That in order to provide adequate transportation facilities for the inhabitants of the City of Tacoma and for the support of the City government it is imperative that the provisions of this ordinance become effective without delay and by reason thereof a public emergency is hereby declared to exist making it necessary that this ordinance take effect immediately after

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[22] *State ex rel. Gray v. Martin*, 29 Wash.2d 799, 805-06, 189 P.2d 637 (1948).

> publication and that the same shall take effect immediately after publication.[23]

The court quoted the *Pennock* court's assertion that a legislative declaration of emergency is conclusive unless obviously false.[24] Nevertheless, the court invalidated the declaration of emergency, holding that the ordinance failed to state an emergency.[25]

In doing so the court clarified that the declaration to which deference is granted is not the assertion of an emergency itself, but the declaration of the facts constituting the emergency. Therefore, no weight was given the city council's opinion that the public transportation need was emergent. Rather, the court concluded that the ordinance, by failing to declare facts that constituted an emergency, failed to declare any emergency to which deference could be granted.

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[23] *Gray*, 29 Wash.2d at 802-03, 189 P.2d 637 (quoting Tacoma Ordinance 13082 (Apr. 16, 1947)) (emphasis omitted).

[24] "We have consistently held that such legislative declaration of emergency and necessity for the enactment is conclusive and must be given effect, unless the declaration on its face is obviously false; and, in determining the truth or falsity of the legislative declaration, we will enter upon no inquiry as to the facts, but must consider the question from what appears upon the face of the act, aided by the court's judicial knowledge. *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 23 P.2d 1. We must give to the action of the legislature and its declaration of an emergency every favorable presumption."

Gray, 29 Wash.2d at 804, 189 P.2d 637 (quoting *Pennock*, 27 Wash.2d at 743-44, 179 P.2d 961).

[25] Gray, 29 Wash.2d at 806, 189 P.2d 637.

The *Gray* court explained that an emergency is that "which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening."[26] Although the ordinance stated facts regarding the need for public transportation, there were no facts that explained why public transportation was so inadequate that emergency measures were required:

> [T]he ordinance contains no statement that a public emergency exists with reference to transportation facilities in Tacoma. True, the statement "to provide adequate transportation facilities" may be interpreted to imply that there is a *need* for such facilities; but the statement does not declare, nor can it be construed to mean, that the transportation facilities in Tacoma are so insufficient or inadequate as to require immediate additional facilities.[27]

The court adhered to this principle in its next emergency clause case by striking down yet another legislative declaration of emergency. In *State ex rel. Humiston v. Meyers*, 61 Wash.2d 772, 380 P.2d 735 (1963), the court attempted to clarify the ambiguity created by the *Pennock* dictum. At issue was the validity of a declaration of emergency in an act authorizing certain gambling activities. The court noted that "[i]t would be inaccurate to say that our former decisions have been consistent in discussing and announcing the rule to be applied."[28] By way of

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[26] *Id.* (quoting *State ex rel. Porter v. Superior Court*, 145 Wash. 551, 559, 261 P. 90 (1927)).

[27] *Gray*, 29 Wash.2d at 808, 189 P.2d 637 (emphasis in original).

[28] *State ex rel. Humiston v. Meyers*, 61 Wash.2d 772, 778, 380 P.2d 735 (1963).

example, the court quoted the *Pennock* court's overstatement of the rule.[29] In holding the declaration of emergency invalid, the court then clarified that no conclusive effect is given the declaration of emergency itself:

> The touchstone of the rule is " . . . what appears upon the face of the act, aided by the court's judicial knowledge."
>
> The face of the act is patently devoid of any facts relating to an emergency (with the exception of the emergency clause itself). . . . We do not indicate that the inclusion of a legislative declaration of policy in an act would, ipso facto, remove the emergency clause from the ambit of the court's constitutional duty to project and test the clause upon the backdrop of the constitution.[30]

The court could hardly have been more clear in its rejection of the idea that the declaration of emergency itself is entitled to deference:

> "[T]he legislature has no right to tack an emergency clause onto an act in order to prevent the people from exercising their right of referendum, unless that act is clearly within the *exception* set forth in the amendment."[31]

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[29] *Humiston*, 61 Wash.2d at 778, 380 P.2d 735 (quoting *State ex rel. Hoppe v. Meyers*, 58 Wash.2d 320, 326, 363 P.2d 121, 100 A.L.R.2d 304 (1961) (quoting *State ex rel. Pennock v. Coe*, 42 Wash.2d 569, 257 P.2d 190 (1953) (quoting *Pennock*, 27 Wash.2d at 743-44, 179 P.2d 961))).

[30] *Humiston*, 61 Wash.2d at 778, 380 P.2d 735.

[31] *Humiston*, 61 Wash.2d at 776, 380 P.2d 735 (emphasis in original).

The next time (and last time before *CLEAN v. State*) that this court considered a challenge to a declaration of emergency was in an appeal from a conviction for drug loitering. In *City of Tacoma v. Luvene*, 118 Wash.2d 826, 827 P.2d 1374 (1992), the defendant challenged the ordinance on overbreadth, vagueness, and preemption grounds. A minor issue was the defendant's novel argument that an invalid declaration of emergency rendered the drug loitering ordinance unenforceable. The court stated that legislative declarations of fact, including declarations of emergency, are conclusive unless " 'obviously false and a palpable attempt at dissimulation.' "[32] In doing so, the court repeated the error of the Pennock court by incorrectly paraphrasing *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 23 P.2d 1 (1933). Yet, in upholding the declaration of emergency the court did not simply defer to the declaration of emergency, but looked to the facts constituting the emergency. The ordinance provided, in part:

> "That time is of the essence in this matter because the City's drug problems are increasing rapidly, causing imminent danger to the public health and safety and to property in the area where drug use is taking place. . . . "[33]

The court concluded that there was no falsehood or dissimulation behind the factual assertion of the City's rapidly increasing drug problems. It was clear, therefore, that

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[32] *City of Tacoma v. Luvene*, 118 Wash.2d 826, 851, 827 P.2d 1374 (1992) (quoting *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 23 P.2d 1 (1933)).

[33] *Luvene*, 118 Wash.2d at 851, 827 P.2d 1374 (quoting Tacoma Ordinance 24167 § 2).

such a threat was sufficiently emergent to validate the declaration of emergency.

This brings us to *CLEAN v. State*, 130 Wash.2d 782, 928 P.2d 1054 (1996), upon which the majority relies for the proposition that a legislative declaration of emergency itself is conclusive. In *CLEAN v. State*, the court was asked to evaluate the validity of a declaration of emergency in a financing act for the new Seattle Mariners major league baseball stadium. The court cited to both *Humiston* and *Luvene* for the proposition that legislative declarations of emergency are conclusive unless obviously false.[34] Yet, as this court had done *in every emergency clause case*, the inquiry did not end with the legislative declaration of emergency. Instead, the court acknowledged "[t]he more knotty question" of whether the financing act was *immediately* necessary, before independently evaluating whether the factual underpinning of the declaration of emergency were legally sufficient to constitute an emergency.[35] The court noted that the Mariners had informed the King County Executive that without a new stadium the Mariners would be offered for sale after October 30, 1995.[36] With only a few weeks to act, on October 11, 1995, the governor called a special session of the Legislature solely to address financing for a new stadium.[37] The session concluded a week later when the Legislature adopted a financing act, which included a

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[34] *CLEAN v. State*, 130 Wash.2d 782, 807-08, 928 P.2d 1054 (1996).

[35] *CLEAN v. State*, 130 Wash.2d at 807, 928 P.2d 1054.

[36] *CLEAN v. State*, 130 Wash.2d at 788, 928 P.2d 1054.

[37] *Id.*

declaration of emergency.[38] The court was satisfied that the Legislature acted in response to a "clear and present danger" that the State's only major league baseball team would be lost without prompt action.[39]

Thus, this court has never given conclusive effect to the assertion of emergency itself. To do so would be to abdicate our duty to evaluate the constitutionality of legislative action. It would be no different than deferring to a legislative declaration that an act were necessary to further a compelling state interest. Instead, this court has upheld declarations of emergency only when the facts established a need for immediate response to public peril.

THE SPOKANE ORDINANCE FAILS TO DECLARE AN EMERGENT THREAT

It is apparent that the factual underpinnings of the Spokane ordinance do not constitute an emergency. Of course, we should give conclusive effect to the Spokane City Council's declaration *of the facts* constituting the emergency. We should accept as true that the downtown area has suffered an economic decline and that the ordinance will revitalize the area.[40] We should also accept as true that the developer must immediately execute leases to commit tenants to the project in order for the project to

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[38] *CLEAN v. State*, 130 Wash.2d at 790-92, 928 P.2d 1054.

[39] *CLEAN v. State*, 130 Wash.2d at 808-09, 928 P.2d 1054.

[40] Majority at 1176 (quoting Spokane Ordinance C31823 (Jan. 27, 1997)).

go forward.[41] Yet, the danger to be remedied is not emergent because the economic decline has already happened.

Although the revitalization of downtown, like the construction of an airport in *Gray*, may be a project in the interest of *improving* the public welfare, it is not necessary for the *immediate preservation* of the public welfare. The failure of the project to proceed would not alter the status quo; it would be merely a lost opportunity to remedy what appears to be a long-standing problem. Thus, the Spokane ordinance is nothing more than an economic stimulus plan precisely of a type upon which the Spokane taxpayers should be allowed to vote. As the *Gray* court observed:

> [The city council] must set forth in the ordinance a statement specifying not a mere conclusion, nor merely the purpose of the ordinance, but an actual existing public emergency. To hold otherwise would be to nullify the power withheld by the people of the city . . . when they provided for a referendum in their city charter, for it would mean a waiver of their express right to referendum whenever their city council chose to declare a certain situation an emergency.[42]

CONCLUSION

Despite the majority's assertion to the contrary, this case is in stark contrast to *CLEAN v. State*, where there was an immediate threat that the State could lose its only major league baseball team and the Legislature took the

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[41] *Id.*

[42] *Martin*, 29 Wash.2d at 808-09, 189 P.2d 637.

extraordinary action of calling a special legislative session solely to address this impending threat. There is no similarly impending threat in the present case. Even giving conclusive effect to the Spokane City Council's concern that the project would fall through without immediate action, a potentially missed opportunity to correct a long-standing problem is not an emergency. The declaration of emergency in the ordinance, therefore, is legally insufficient to suspend the right of referendum the citizens of Spokane reserved to themselves in their city charter.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

CLEAN (Citizens for Leaders with Ethics and Accountability Now!), et al., Appellants, v. CITY OF SPOKANE, a Washington first class charter city, et al., Respondents. and CITIZENS REALTY COMPANY, a Washington corporation, et al., Respondents.	NO. 65262-7 **ORDER DENYING MOTION FOR RECONSIDERATION**

The Court having considered the Motion for Reconsideration of Appellants;

Now, therefore, it is hereby

ORDERED:

That the Appellants' motion for reconsideration is denied.

DATED at Olympia, Washington this 5th day of February, 1998.

/s/ Durham CJ
CHIEF JUSTICE

APPENDIX C

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SPOKANE COUNTY

CLEAN (Citizens for Leaders with Ethics and Accountability Now!), a Washington non-profit corporation; SPOKANE RESEARCH AND DEFENSE FUND, a Washington non-profit corporation; and COALITION FOR A NEW SPOKANE, a Washington non-profit corporation, Plaintiffs, v. CITY OF SPOKANE, a Washington first-class charter city; the SPOKANE CITY COUNCIL; and SPOKANE PARKING PUBLIC DEVELOPMENT AUTHORITY, a City of Spokane public corporation, Defendants and CITIZENS REALTY COMPANY and LINCOLN INVESTMENT COMPANY OF SPOKANE, Intervenors	NO. 96-2-06361-9 ORDER OF DISMISSAL AND/OR SUMMARY JUDGMENT IN CAUSE NOS. 96-2-06361-9, 97-2-00645-1 AND 97-2-00644-3

PRIORITIES FIRST, a Washington political action committee, RICHARD D. ADAMS, an individual,

Plaintiffs

v.

CITY OF SPOKANE, a Washington first class charter city,

Defendant

and

CITIZENS REALTY COMPANY and LINCOLN INVESTMENT COMPANY OF SPOKANE,

Intervenors

Consolidated with

NO. 97-2-00645-1

MARGARET LEONARD, an individual,

Plaintiff

CITY OF SPOKANE, a Washington first class charter city,

Defendant

and

CITIZENS REALTY COMPANY and LINCOLN INVESTMENT COMPANY OF SPOKANE,

Intervenors.

Consolidated with

NO. 97-2-00644-3

I. HEARING

1.1 Hearing. This matter came before the Court for hearing on April 9, 1997, on the Motion for Dismissal or in the Alternative Summary Judgment on behalf of the defendants, City of Spokane and Spokane Parking Public Development Authority, and the Intervenors, Citizens Realty Company and Lincoln Investment Company of Spokane.

1.2 Appearances. Thomas F. Kingen appeared on behalf of Defendants, Spokane Public Development Authority and the City of Spokane, Duane Swinton, appeared on behalf of Intervenors, Citizens Realty and Lincoln Investments, and Stephen K. Eugster appeared on behalf of plaintiffs, CLEAN, Spokane Reserach and Defense Fund, Coalition for a New Spokane, Priorities First, Richard Adams, John Talbott and Margaret Leonard.

1.3 Evidence. In rendering this order, this Court has considered the documents and evidence contained in the court docket for Cause Nos. 96-2-06361-9, 97-2-00645-1, and 97-2-00644-3, attached hereto as Exhibit "A" incorporated by this reference herein, together with the Stipulation dated March 18, 1997, attached hereto as Exhibit "B" and incorporated by this reference herein.

II. FINDINGS

This court, having considered oral arguments of counsel, having reviewed the above-mentioned evidence and pleadings presented, and being fully advised in the matter, finds that there is no genuine issue as to any

material fact in this action, and therefore, the City of Spokane, the Spokane Public Development Authority, and the Intervenors, Citizens Realty and County [sic] and Lincoln Investment Company are entitled to judgment as a matter of law.

III. JUDGMENT

On the basis of the foregoing findings, NOW, THEREFORE, IT IS HEREBY ADJUDGED, ORDERED AND DECREED that:

1. The Complaint for Declaratory and Injunctive Relief dated February 7, 1997, (Amending the Application for Writ of Prohibition and Complaint for Declaratory and Injunctive Relief dated October 22, 1996) is hereby dismissed in Cause No. 96-2-06361-9.

2. The Complaint for Declaratory Relief dated February 3, 1997, (together with the Amended Complaint for Declaratory Relief and Application for Writ of Mandamus in Cause No. 97-2-00645-1 is dismissed.

3. The Complaint for Declaratory Relief dated February 3, 1997, in Cause No. 97-2-00644-3 is dismissed.

4. The Intervenor's motion to dismiss the Plaintiff CLEAN, in Cause No. 96-2-06361-9 is denied.

5. Defendants' Joint Motion to Strike the Declaration of Stephen K. Eugster is granted as to paragraphs 3 and 4 of the declaration and denied as to all other portions of the declaration.

6. Upholds as exempt from public disclosure the addendum to the Coopers & Lybrand Report (Item 138 of

the Stipulation dated March 18, 1997) pursuant to RCW 42.17.310(r) and (h).

7. The Court's Memorandum Decision dated April 11, 1997, attached hereto as Exhibit "C" fully states the Court's decision dismissing the actions set forth in paragraphs 1, 2 and 3 of this judgment.

DONE IN OPEN COURT THIS 16th day of April, 1997.

KATHLEEN M. O'CONNOR
HONORABLE
KATHLEEN O'CONNOR
Spokane County Superior
Court Judge

PRESENTED BY:

PERKINS COIE
/s/ _____
Thomas F. Kingen, WSBA #6692
Attorney for Defendant, Spokane PDA

CITY OF SPOKANE

JAMES C. SLOANE
City Attorney

By: /s/ _____
Stanley M. Schwartz, WSBA #15518
Assistant City Attorney
Attorneys for Defendant, City of Spokane

WITHERSPOON KELLEY DAVENPORT & TOOLE

By: /s/ _____
Duane Swinton, WSBA #8354
Attorney for Intervenors

NOTICE OF PRESENTMENT WAIVED:

EUGSTER HASKELL

/s/ _____
Stephen K. Eugster, WSBA #2003
Attorney for Plaintiffs

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

CLEAN (Citizens for Leaders with Ethics and Accountability Now!), a Washington non-profit corporation; SPOKANE RESEARCH & DEFENSE FUND, a Washington non-profit corporation; and COALITION FOR A NEW SPOKANE, a Washington non-profit corporation, Plaintiffs, vs. CITY OF SPOKANE, a Washington first class charter city; the SPOKANE CITY COUNCIL; and, SPOKANE PUBLIC DEVELOPMENT AUTHORITY, a City of Spokane public corporation, Defendants, and CITIZENS REALTY COMPANY, a Washington corporation; and LINCOLN INVESTMENT COMPANY, a Washington corporation, Intervenors-Defendants.	No. 96-2-06361-9 (Consolidated with 97-2-00645-1 and 97-2-00644-3) MEMORANDUM DECISION

PRIORITIES FIRST, a Washington political action committee; RICHARD D. ADAMS, an individual; and, JOHN TALBOTT, an individual,

Plaintiffs,

vs.

CITY OF SPOKANE, a Washington first class charter city; and its CITY COUNCIL,

Defendants,

and

CITIZENS REALTY COMPANY, a Washington corporation; and, LINCOLN INVESTMENT COMPANY, a Washington corporation,

Intervenors-Defendants.

No. 97-2-00645-1

MARGARET LEONARD, an individual,

Plaintiff,

vs.

CITY OF SPOKANE, a Washington first class charter city,

Defendants,

and

No. 97-2-00644-3

CITIZENS REALTY COMPANY, a Washington corporation; and, LINCOLN INVESTMENT COMPANY, a Washington corporation,

Intervenors-Defendants.

THIS MATTER came before the court for oral argument on April 9, 1997, on Intervenor-Defendants' Motion to Dismiss for Lack of Standing and Intervenor-Defendants' Motion to Dismiss, or in the Alternative Motion for Summary Judgment. The court has received the following pleadings pertinent to these motions:

1. Note for Hearing – Issue of Law re Motion for S.J. and Motion to Dismiss
2. Replacement Memorandum in Support of Intervenor-Defendants' Motion to Dismiss, or in the Alternative Motion for Summary Judgment
3. Response to Intervenor-Defendants Motion to Dismiss for Lack of Standing
4. Declaration of Stephen K. Eugster (April 1, 1997)
5. Response of Plaintiffs to Memorandum of Developers
6. Brief of Plaintiffs Priorities First et al. (Emergency Legislation Issue)
7. Brief of Plaintiff Leonard
8. Notice of Application
9. Application for Writ of Mandamus
10. COPY OF CASE: Clean, et al. v. The State of Washington, 130 Wn.2d 782

STATEMENT OF THE CASE

The Intervenor-Defendants' (Developers') own property in downtown Spokane bounded by Spokane Falls Boulevard, Main Avenue, Lincoln Street and Wall Street. This property includes the River Park Square shopping mall and garage. In early 1995 the Developers approached the City of Spokane seeking their assistance in the redevelopment of River Park Square. In order to facilitate expansion, the River Park Square garage should be expanded from 750 car parks to 1,304 parking spaces. The retail portion of the project includes construction of a new building at the corner of Lincoln Street and Main Avenue to be occupied by Nordstrom, Inc., and additional retail space. This project will also require the vacation of a portion of Post Street and an alley between Post Street and Wall Street.

Pursuant to City Council Resolution 95-73 the City applied to the Department of Housing and Urban Development (HUD) for an Economic Development Grant (EDI) and a HUD Section 108 guaranteed development loan. HUD approved a $1,000,000 EDI grant on June 20, 1995. The Section 108 application is currently being evaluated by HUD.

The Developers submitted a State Environmental Protection [sic] Act (SEPA) checklist and the City issued a Mitigated Determination of Non-Significance on July 2, 1996 (LR 85). Notice of this decision was published. No appeal was taken from this decision.

The legislative record in this case consists of some 158 documents including a transcript of public testimony on October 17, 1996, January 13, 1997, and January 27,

1997 (LR 152). The record reflects the changes that were made in the City's proposed participation in the project; specifically, the City decided not to purchase the garage outright. As Ordinance No. C31823 indicates, the Developers will build the garage and sell the building, not the land on which it sits, to the Spokane Downtown Foundation (Foundation). The Foundation is a nonprofit corporation which intends to issue tax-exempt bonds on behalf of the City payable over 21 years from the revenues from the garage.

In turn, the Foundation will lease the garage to the Spokane Public Development Authority (PDA) which has been created pursuant to RCW 35.21.730 et seq. which will operate the facility. In addition, the Foundation will enter into a ground lease with the Developers and assign that lease to the PDA. When the bonds issued by the Foundation have been repaid, the City will acquire title to the garage at no cost.

Through Ordinance No. C31823 the City also created a parking meter revenue fund. Parking meter revenue will be deposited into the fund and "contingently pledged" to pay the operating expenses of the garage and the ground lease payments in the event the garage revenues are not sufficient to maintain the garage in a "first-class condition" (LR 142, Bates 02347).

As of the date of this opinion the Section 108 HUD loan has not been approved; however, as a condition of application, the City agrees to pledge its future Community Development Block Grants as repayment of the loan if the Developers default.

Ordinance No. C31823 was passed on January 27, 1997. On January 30, 1977 [sic], plaintiffs, Priorities First, Richard Adams and John Talbott, presented a referendum petition to the Spokane City Clerk. The City Clerk assigned a number to the petition and the plaintiffs subsequently collected over 8,000 signatures. The City has indicated it will not honor the referendum petition.

On February 3, 1997, plaintiffs Priorities First and Margaret Leonard filed Complaint(s) for Declaratory Relief, indexed as cause numbers 97-2-00645-1 and 97-2-00644-3 respectively. Plaintiffs CLEAN, et al., filed an amended Complaint for Declaratory and Injunctive Relief on February 7, 1997. All three files were consolidated by order of the court on February 21, 1997.

Subsequently, Intervenor-Defendants filed the Motion to Dismiss for Lack of Standing and a Motion to Dismiss (CR 12 (b)), or in the Alternative a Motion for Summary Judgment (CR 56). All of the pleadings are listed above including a Notice of Application and Application for Writ of Mandamus filed by all plaintiffs on April 1, 1997.

ISSUES

1. DOES PLAINTIFF CLEAN (CITIZENS FOR LEADERS WITH ETHICS AND ACCOUNTABILITY NOW!) HAVE STANDING TO BRING THIS ACTION?

Intervenor-Defendants assert CLEAN, a nonprofit corporation with headquarters in Tacoma, Washington, does not have standing to bring this action in Spokane County because there are no state tax funds implicated

and the City is not using tax funds to participate in the project.

Plaintiffs assert CLEAN has standing because plaintiffs Adams and Talbott (1) are members of CLEAN, (2) are residents and taxpayers of the City of Spokane, and (3) park their cars on city streets and use parking meters. Mr. Eugster's Declaration filed April 1, 1997, also indicates he asked the Attorney General of the State of Washington to take action in this matter and the Attorney General declined to do so. Thereafter, this private taxpayer action commenced.

Plaintiffs Adams and Talbott are residents and taxpayers and are members of CLEAN. I am satisfied there is a sufficient nexus between CLEAN and this case, through Adams and Talbott, to allow CLEAN to continue as a party. Intervenor-Defendants' Motion to Dismiss for Lack of Standing is denied.

2. DOES THE CITY OF SPOKANE (CITY) AND THE SPOKANE PUBLIC DEVELOPMENT AUTHORITY (PDA) HAVE THE AUTHORITY TO PARTICIPATE IN THE RIVER PARK SQUARE PARKING GARAGE PROJECT?

Plaintiffs contend that the City and the PDA do not have the ability to acquire and operate a garage as the City is not in compliance with RCW 35.86 and RCW 35.86A.

RCW 35.86.010 provides:

> "Cities of the first, second, and third classes are authorized to . . . In addition a city may own

> other off-street parking facilities and operate them in accordance with RCW 35.86A.120."

The Supreme Court in *In the Matter of the Petition of The City of Auburn, The City of Auburn v. Roy M. Hawkins, et al.*, 65 Wn.2d 560, 398 P.2d 723 (1965), confirmed at page 566:

> "The statute was intended to enable cities to prevent or alleviate traffic congestion and thus to enable streets to serve the purpose for which they were primarily intended, i.e. to enable the traveling public to get from one place to another. In this age of traffic congestion, the right to furnish off-street parking is a necessary adjunct to the right to regulate and control traffic. (citations omitted)"

The City has not elected to use the general provisions of RCW 35.86A nor is there any authority submitted to this court that they are required to do so. However, RCW 35.86.010 does require that the operation of a garage be in accordance with RCW 35.86A.120 which outlines a public bidding process for soliciting a private entity to operate the facility.

However, the City must comply with RCW 35.86.050 which essentially requires development of a plan, doing physical and economic surveys, if necessary, preparing a comprehensive plan and holding public hearings. This statute does not require a specific checklist or statutory process but rather a process whereby the public can have specific information on the nature of the proposed acquisition; its cost/benefit to the City; and the financing mechanisms.

Intervenor-Defendants point to the original Downtown Spokane Development Plan adopted in 1992 (LR 6) as a starting point. In addition, the City commissioned a parking study from Walker Consultants (LR 93) and a financial feasibility study from Coopers & Lybrand (LR 138 and 140) on the proposed project. Public hearings were held on October 17, 1996, January 13, 1997, and January 27, 1997, where the plan and economic issues were extensively discussed. Ordinance No. C31823 was passed and its findings address what the City is intending to do with respect to the garage and what the financing mechanism is.

In the case of *Hutchinson v. Port of Benton*, 62 Wn.2d 451, 383 P.2d 500 (1963), cited by both sides, the Supreme Court reviewed an analogous planning process with respect to a Port District and looked at the substance of the information provided to taxpayers. As the court stated at page 457:

> "We think the foregoing comprehensive plan, while not held to be a model of preciseness, is sufficient to give the taxpayers a fairly detailed picture of what the port will do with this land if and when it is acquired, and informs the taxpayers of the manner and purposes for which their money will be spent."

In reviewing all of the materials in the record I am satisfied the City complied with RCW 35.86.050 and provided a plan, necessary studies and an opportunity for public comment before the adoption of Ordinance C31823.

As noted in the Statement of Facts, the PDA was created pursuant to RCW 35.21. The record also reflects

the incorporation of RCW 35.21 provisions in the Spokane Municipal Code (SMC) (LR 124) and Ordinance C31810 which amended the SMC to allow the PDA to acquire and operate off-street parking facilities (LR 125). The plaintiffs allege the PDA does not have the authority to engage in these activities.

However, a simple reading of RCW 35.21.730 indicates that cities do have the authority to create public corporations for many purposes including the execution of federal grants. In fact, one of the express purposes of RCW 35.21.730 is to "improve the administration of authorized federal grants or programs . . . ". This court recognizes the plaintiffs' primary argument goes to the issue of "public purpose" which will be addressed below; however, as a mechanism for the administration of federal grants, the creation of a PDA is proper under RCW 35.21.730 including the authority of the PDA to acquire and operate off-street parking facilities.

3. DOES THE RIVER PARK SQUARE GARAGE PROJECT FULFILL A PUBLIC PURPOSE?

Plaintiffs argue the expansion of the River Park Square Parking Garage will primarily benefit the private developer who should undertake the financing of the project themselves. Intervenor-Defendants assert the public will benefit from the project and further the use of City funds is limited and contingent.

In December 1996 the Washington State Supreme Court decided *CLEAN, et al. v. The State of Washington*, 130 Wn.2d 782. That case does address the standards a reviewing court should use when asked to evaluate a

claim of "public purpose". As a general principle, it is not the role of the court to substitute its judgment for the judgment of elected officials acting in their legislative capacity. In this case it is the Mayor and the City Council who listen to the testimony of all interested parties; commission necessary studies and surveys to evaluate a project; review funding mechanisms and articulate the public benefits of legislation. It is the role of the court to insure that legislative bodies act within the scope of their authority as defined by the Washington State Constitution and Revised Code of Washington.

The CLEAN court at page 792 and 793 reiterates the basic premise

> " . . . that public funds cannot be used to benefit private interests when the public interest is not primarily being served. (citation omitted). Public expenditures must, therefore, further public purposes. (citation omitted). An expenditure is for a public purpose when it confers a benefit of reasonably general character to a significant part of the public. (citation omitted) Where it is debatable as to whether or not an expenditure is for a public purpose, we will defer to the judgment of the legislature." *Anderson v. O'Brien*, 84 Wn.2d 64, 70, 524 P.2d 390 (1974).

The *CLEAN* court also indicated that the fact a private interest may benefit from a public project is not fatal to the project ". . . as long as a public purpose is being served. The fact that private ends are incidentally advanced is immaterial to determining whether legislation furthers a public purpose. *United States v. Town of North Bonneville*, 94 Wn.2d 827, 621 P. 2d 127 (1980)." at page 796.

As in the *CLEAN* case, the participation of the City in the River Park Square Parking Garage project was extensively debated. The record is lengthy and highlights competing philosophical views about the purpose of the government and the extent of its authority. In addition, there was significant economic information developed which is subject to more than one interpretation. But as the *CLEAN* case indicates at page 796 and 797:

> ". . . The disagreement that underlies that debate, however, is best resolved by the people's elected representatives in the Legislature. In our judgment, they are in a superior position to evaluate the extent to which a public purpose is served by the realization of the perceived benefits. In deciding these questions, we believe it was appropriate for the Legislature to consider that the concept of what is public purpose is not a static concept. Rather, it is a concept that must necessarily evolve and change to meet changing public attitudes. *See Bonneville* 94 Wn.2d at 833. The Legislature with its staff and committees is the branch of government better suited to monitor and assess contemporary attitudes than are the courts."

Ordinance No. C31823 has thirteen separate paragraphs articulating the reasons why this project would benefit Spokane and fulfill a public need. Those reasons include, but are not limited to, parking for civic activities; ancillary to an to an [sic] efficient street system; reliable parking to improve public safety and improve the financial stability of the City. While these "benefits" are vigorously debated by plaintiffs, they are some of the reasons why the City Council adopted this ordinance after

lengthy debate. It is not for this court to second guess those reasons.

4. IS THE CITY AND PDA'S PARTICIPATION IN THE PROJECT A GIFT OR LOAN OF PUBLIC CREDIT?

The Washington Constitution, Article VIII, Section 5, states: "The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation." Section 7 of that same article provides:

> "No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation."

It is well recognized that these provisions "prevent state funds from being used to benefit private interests where the public interest is not primarily served." *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 98, 558 P.2d 211 (1977).

The *CLEAN* court articulates a two pronged test to be used to evaluate the expenditure of funds. First, are the funds being expended to carry out a *fundamental* purpose of government? If so, the inquiry ends there. In this case the Intervenor-Defendant argues furnishing of public parking is a public purpose and I would agree. RCW 35.86A.010 does support that position; however, the issue

is whether provisions for parking are a fundamental purpose of government. It is questionable whether off-street parking, in this case, serves a fundamental purpose of government. Therefore, the second prong of the test should be analyzed.

What is the consideration for the expenditure of public funds and the donative intent of the City? Will a gift occur? In this case the City has obligated parking meter revenue on a contingent basis to be used only if the PDA cannot meet the lease payments on the garage. In return for this the City will receive title to the garage when the bond term expires. There is no gift to the Developer, the Foundation or the PDA. This is a negotiated arrangement whereby the City will ultimately receive the garage. This arrangement has both consideration and a public purpose which is sufficient to withstand scrutiny under Article VIII, Sections 5 and 7, of the Washington State Constitution.

Plaintiffs also take issue with the City's participation in the EDI Grant and Section 108 HUD Development Loan process. However, here it is clear no City funds are implicated. The EDI Grant is federal money which the City applied for to use for this project. If a Section 108 HUD Development Loan is granted, those are federal funds which will be used by the Developer.

If the Developer were not to repay the Section 108 HUD Development Loan, the federal government would look to future Community Development Block Grants to which the City may be entitled to repay the loan. However, these CDBGs are not City monies, they are federal entitlements which the City may receive in the future.

Certainly, putting those monies (if they could be received) at some risk in this process is a factor the City Council weighed in evaluating the value of the project to the City; however, it does not rise to the level of an extension of the City's credit which would violate the Washington State Constitution.

5. IS SECTION 14 (EMERGENCY CLAUSE) OF ORDINANCE C31823 VALID?

Plaintiffs strongly take issue with Section 14 of the Ordinance which is the Emergency Clause. Again the *CLEAN* case is instructive on this issue.

> " ' . . . such legislative declaration of emergency and necessity for the enactment is conclusive and must be given effect, unless the declaration on its fact is obviously false; and, in determining the truth or falsity or the legislative declaration, we will enter upon no inquiry as to the facts but must consider the question from what appears upon the face of the act, aided by the court's judicial knowledge. We must give to the action of the legislature and its declaration of an emergency every favorable presumption.' " *CLEAN v. State*, at page 807, citing *State ex rel. Humiston v. Myers*, 61 Wn.2d 772, 776, 380 P.2d 735 (1963).

In short, unless the declaration of an emergency is "obviously false and a palpable attempt at dissimulation", *CLEAN* at page 808, the legislative determination will be given deference.

In this case plaintiffs assert there was no real emergency and that Section 14 was "tacked on" to the Ordinance at the last minute to prevent a referendum. Section

14 does articulate reasons for the emergency including the need to create additional jobs in the Central Business District and the corresponding need to commit to Nordstrom and other project tenants soon. The record reflects that the expansion of the parking garage is a critical component to the redevelopment and that tenants needed a commitment quickly in order to meet construction deadlines.

The court cannot go behind the City Council's emergency declaration and reasons therefor unless there is a showing the reasons are obviously false. The plaintiffs cannot meet that burden. While they may debate whether the Developers' assertions that "time is of the essence" are valid, the record reflects there is evidence upon which the City could justifiably declare an emergency.

6. DOES SECTION 85 OF THE CITY CHARTER REQUIRE A REFERENDUM ON THE CITY'S PARTICIPATION IN THE RIVER PARK SQUARE PARKING GARAGE PROJECT?

Section 85 of the Spokane City Charter requires that a vote of the people be required for all capital expenditures. Subsection (b) defines capital expenditures as follows:

> "(b) Capital expenditures for capital projects requiring a vote of the people shall include but not be limited to coliseums, convention centers, stadiums, planetariums and new proposed projects not currently the obligation of the taxpayers and property owners."

Plaintiffs assert the lease between the Foundation and the PDA is a capital expenditure. However, the City is making a contingent pledge of funds from a dedicated source, parking meter revenue; the City is not obligating general taxpayer revenue but rather the user fees collected from the parking meters.

The initiative which forms the basis of Section 85 of the Spokane City Charter was interpreted by the Washington State Supreme Court in the case of *The City of Spokane v. The Taxpayers of the City of Spokane*, 111 Wn.2d 91, 758 P.2d 480 (1988). The court indicated at page 98:

> " . . . The City contends the initiative ordinance applies only to capital expenditures which required indebtedness of the taxpayers, . . . The City is correct in its analysis that the project will not create indebtedness for the taxpayers. . . . repayment of the City's obligations will not come from general taxes, but rather from specific sources such as revenues of the solid waste disposal system . . . We have recognized the difference between indebtedness which obligates the taxpayers and the property owners and that which obligates a special fund. Payments from special revenue funds are not general obligations of the City."

If the obligation is not a general obligation of the City it is not subject to Section 85.

This court is mindful that the right of initiative and referendum in the State of Washington has a long history. As many commentators have stated, these processes include citizens in the legislative process directly and complement the work of their elected representatives. However, it is also recognized that not every legislative

decision can be put to a vote of the people. Section 85 was itself created through the initiative process and is limited to situations which implicate the direct expenditure of taxpayer funds in non-emergency situations. In this case there is not a direct expenditure of taxpayer funds. Further, Ordinance No. C31823 does include a valid emergency provision which was discussed above.

Finally, the plaintiffs assert the fact the City Clerk gave them a number for their referendum petition somehow validates their position the garage expansion project is required to be on the ballot. That is simply not the case. The actions of a city employee do not take priority over the plain meaning of Section 85 of the City Charter nor the case law interpreting that section.

7. HAS THE CITY COMPLIED WITH THE FOLLOWING STATUTES:

   A. STATE ENVIRONMENTAL POLICY ACT (SEPA) – RCW 43.21C?

   B. GROWTH MANAGEMENT ACT – RCW 36.70A?

   C. WASHINGTON CLEAN AIR ACT – RCW 70.94?

   D. COMPETITIVE BIDDING LAWS – RCW 35.22; SMC 7.06?

With respect to plaintiffs' allegations under RCW 43.21C (SEPA) and RCW 70.94 (Washington Clean Air Act), their action is time barred. As indicated in the Statement of Facts, the Developers submitted a SEPA checklist and the City issued a Mitigated Determination of Non-Significance on July 2, 1996. No appeal was taken from this decision. There is no indication the physical

characteristics of the garage expansion project are materially different today.

The proposed vacation of a portion of Post Street is exempt from EIS requirements under WAC 197-11-800 (2)(h).

Currently the City does not have a Growth Management Plan in place so there is no GMA plan to comply with. This project has been addressed within the context of the current Downtown Spokane Development Plan.

Finally, the proposed project does not implicate RCW 35.22 nor SMC 7.06. The City is not entering into a contract to perform a public work or purchase goods either of which would require competitive bidding. The City is not contracting to construct the garage expansion. The City is not purchasing the garage now or later. Rather, in return for the City's assistance in the Section 108 HUD Development Loan process and a contingent pledge of parking meter revenues in the event the PDA cannot meet the operational costs of the garage and the ground lease; the City will take title to the garage free and clear when the bond obligations are retired. The PDA will put the operation of the garage out to bid as required by RCW 35.86A.120 and Internal Revenue Ruling 63-20.

SUMMARY

This issue is an emotional one for both sides. The quality of the legal work amply demonstrates how dedicated all parties are to their vision of Spokane and their view of the role of government in our community. The City Council had the opportunity to hear and view the

many diverse opinions and concerns raised by citizens both for and against the project. That is as it should be, for it is in the legislative arena, where there is the open give and take of ideas, that our elected representatives can thoughtfully consider all positions and do what they believe to be in the best interest of the citizens of the City of Spokane. Whatever disagreements the plaintiffs may have with the decision, it is the hope of this court that they recognize the process is fair, open, and democratic and that they have had the opportunity to express their views and provide relevant information to the City Council.

Intervenor-Defendants' Motion for Summary Judgment is granted and the plaintiffs' Application for Writ of Mandamus is denied.

DATED this 11th day of April, 1997.

/s/ Kathleen M. O'Connor
KATHLEEN M. O'CONNOR
Superior Court Judge

APPENDIX D

Cause No. 65258-9

SUPREME COURT
OF THE STATE OF WASHINGTON

CLEAN (Citizens for Leaders with Ethics and accountability Now!), a Washington non-profit corporation; **SPOKANE RESEARCH & DEFENSE FUND,** a Washington non-profit corporation; **COALITION FOR A NEW SPOKANE,** a Washington non-profit corporation; **PRIORITIES FIRST,** a Washington political committee; **RICHARD ADAMS,** an individual; **JOHN J. TALBOTT,** an individual; and, **MARGARET LEONARD,** an individual,

Appellants,

vs.

CITY OF SPOKANE, a Washington first class charter city; **SPOKANE PUBLIC DEVELOPMENT AUTHORITY,** a City of Spokane public corporation,

Respondents,

and

CITIZENS REALTY COMPANY, a Washington corporation; and **LINCOLN INVESTMENT COMPANY,** a Washington corporation,

Intervenors-Respondents.

MOTION FOR RECONSIDERATION
OF APPELLANTS

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I. Identity of Moving Parties

Appellants ask for the relief designated in Part 2.

II. Statement of Relief

Appellants seek the Court's reconsideration of its decision in this matter regarding the validity of the emergency language in City of Spokane Ordinance C-31823 adopted on January 27, 1997.

III. Facts Relevant to Motion

Prior to the vote on Ordinance C-31823, the Spokane City Council passed a motion to tack emergency clause language onto the Ordinance. In conjunction with this, the Developers (Intervenors-Respondents) submitted a letter outlining their emergency. Stipulation, 150.

On January 30, 1997, Priorities First and others presented a Referendum Petition to the City Clerk. Stipulation, 149. After discussions with the City Clerk and City Attorney, a referendum petition number was assigned – it

became Referendum Petition 97-1. Stipulation, 151. Thereafter, the proponents secured the signatures of over 8,000 electors of the City of Spokane.

Referendum Petition 97-7, together with the signatures was presented to the City Clerk on February 25, 1997 – within the necessary 30 day period for a referendum petition. Stipulation, 153 and 154. The number of valid signatures met the requirements of City Charter § 83. Only 4,300 or so were necessary. *Id. See also,* Election Statistics for City of Spokane November 1995 – Spokane County Auditor. The City refused to comply with the Referendum Petition.

The Court has held that the emergency language in Ordinance C-31823 was valid and that Appellants did not have a right of referendum with respect of the Ordinance.

IV. Grounds for Relief and Argument

Appellants respectfully request that the Court reconsider its decision regarding the validity of the emergency language in Ordinance C-31823.

The decision effectively prevents Appellants from the exercise of their constitutionally protected right of referendum under the Spokane City Charter.

The right of referendum is political speech which occupies the core of the protection afforded by the First Amendment and the Due Process Clause of the Fourteenth Amendment. *See, e.g., McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 346 (1995); *Meyer v. Grant,* 486 U.S. 414, 421 (1988); *Bank of Boston v. Bellotti,* 435 U.S. 765, 776-777 (1978).

The First Amendment provides that Congress

> shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment makes that prohibition applicable to the State of Washington. As the Supreme Court explained in *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940),

> [t]he freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State.

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). As the Supreme Court has said this reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *See also, Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

Appellants seek, by referendum, to achieve political change in Spokane; their right freely to engage in the referendum and in discussions concerning the need for that change is guarded by the First Amendment and the Fourteenth Amendment.

In *Meyer v. Grant* the Supreme Court said that "both the expression of a desire for political change and a

discussion of the merits of the proposed change" are "core political speech." *Meyer v. Grant, supra,* 486 U.S. at 421.

Where a challenged practice, here preventing a referendum on an ordinance by calling it an emergency, imposes a severe burden on political expression, courts must review the practice with strict scrutiny. *Cf. Burdick v. Takushi,* 504 U.S. 428, 434 (1992). The instant case "involves a limitation on political expression subject to exacting scrutiny." *Meyer v. Grant,* 486 U.S. 414, 420 (1988).

The Supreme Court has said "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978).

Here, the decision of the Court (and the decision of the City of Spokane) burdens Appellants' right of referendum, Appellants' right of core political speech. *McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 346 (1995).

When subjected to the exacting scrutiny required by the First and Fourteenth Amendments to the United States Constitution the decision of the Court falters.

Decision making regarding the validity of emergency language must meet the exacting scrutiny test. Here, the test is not met because the decision of the Court imposes no standards. It simply gives the legislative body arbitrary authority to say what is, or is not, an emergency and thus prevents Appellants from engaging in their constitutionally protected rights.

Appellants respectfully request that the Court reconsider its decision.

December 1, 1997.

Respectfully submitted,

EUGSTER HASKELL, P.S.C.

/s/ Stephen K. Eugster
Stephen K. Eugster, WSBA #2003
Attorneys for Appellants – All

/s/ S. Newman by SKE
Shawn Timothy Newman
WSBA#14193
Attorney for Appellants – CLEAN, Spokane Research & Defense Fund, and Coalition for a New Spokane

APPENDIX E

ORDINANCE NO. C31823

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SPOKANE RELATING TO OFF STREET PARKING FACILITIES; PROVIDING FOR THE DEVELOPMENT AND ACCEPTANCE OF FULL LEGAL AND UNENCUMBERED TITLE TO THE RIVER PARK SQUARE PARKING GARAGE LOCATED ADJACENT TO CIVIC CENTER FACILITIES; CREATING THE PARKING METER REVENUE FUND; CONTINGENTLY PLEDGING MONEY IN SAID FUND TO MAKE CERTAIN PAYMENTS TO THE CITY'S PUBLIC DEVELOPMENT AUTHORITY; DECLARING AN URGENCY AND EMERGENCY AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO

OFF-STREET PARKING FACILITIES

THE CITY OF SPOKANE DOES ORDAIN:

WHEREAS, the City of Spokane, Washington (the "City"), is a first-class charter city duly organized and existing under and by virtue of the Constitution and the laws of the State of Washington and the Charter of the City;

WHEREAS, the Council of the City (the "Council") recognizes the public interest in sustaining the Spokane Downtown Central Business District (the "CBD") as described in the Downtown Spokane Development Plan prepared November 20, 1990, as the region's economic, cultural and civic activity center;

WHEREAS, the City has committed public finances and resources to the CBD by constructing, maintaining and operating numerous civic center facilities such as: (i) the Spokane City Hall, (ii) the main branch of the Spokane Public Library, (iii) Riverfront Park, (iv) the Spokane Agricultural Trade Center, (v) the Spokane Convention Center and Opera House and (vi) other infrastructure and service improvements in or adjacent to the CBD, which improves the character, role and function of the CBD for Spokane citizens, employers, employees and visitors;

WHEREAS, the provision of convenient, accessible, and attractive off-street public parking in the CBD will provide a benefit to the civic center facilities, prevent and alleviate traffic congestion, improve vehicular access and circulation, directly and indirectly improve public safety and promote the use of municipal streets by facilitating the movement of vehicles in the CBD, all of which serves a public purpose;

WHEREAS, the most efficient use of the CBD street system requires the availability of conveniently located off-street parking for vehicles where large numbers of persons congregate;

WHEREAS, the inability to temporarily park vehicles discourages the public from: (i) travel to and within the City, (ii) congregating at public events and (iii) using civic center facilities;

WHEREAS, off-street public parking is a necessary extension and ancillary to an efficient street system in the CBD;

WHEREAS, the City is authorized by chapter 35.86 RCW to provide off-street parking facilities as a public purpose;

WHEREAS, on June 12, 1995, the Council adopted its Resolution 95-74, which authorized and directed the City Manager to proceed with the development of a proposal for the acquisition and development of a public parking facility, recognizing the public benefit that would accrue as a result of the City acquiring off-street parking facilities;

WHEREAS, on June 10, 1996, the Council adopted its Resolution 96-77, which further directed City staff to represent the City in meetings with Lincoln Investment Company of Spokane and Citizens Realty Company (collectively, the "Developer"), as owners of the River Park Square Parking Garage and to prepare a report for the Council on the economic feasibility and legal authority of the City acquiring said parking garage;

WHEREAS, the Council authorized the City Manager to commission into a financial feasibility study and a condition assessment with Walker Parking Consultants/ Engineers (the "Walker Report"), with the City receiving a report from Walker plus an addendum on October 16, 1996, concluding that additional off-street public parking is required to serve the Project and civic center facilities;

WHEREAS, the Developer owns certain real property situated in the City which is proposed to be redeveloped into a two block mixed-use project containing, in addition to public parking facilities, approximately 300,000 square feet of gross area available for lease for new retail stores, restaurants and entertainment uses (the "Project"), which

will improve the CBD by promoting economic activity, increasing public safety and revenue to the City;

WHEREAS, the acquisition of off-street parking facilities will provide convenient public parking for users and visitors to City Hall, Riverfront Park, and the main branch of the Spokane Public Library as well as other municipal and governmental offices and civic center facilities, some of which are connected to the existing off-street parking facilities by a pedestrian skywalk system;

WHEREAS, the Developer intends to design and construct off-street parking facilities to consist of an existing parking garage, plus an additional underground and above ground parking structure connected to the existing parking garage, with 1,304 public parking spaces to serve the civic facilities and the parking needs of the CBD (the "Facility");

WHEREAS, the provision of safe and reliable public parking will increase downtown activity and improve public safety;

WHEREAS, the Spokane Downtown Foundation (the "Foundation") has been formed as a nonprofit corporation of the State of Washington which anticipates issuing tax-exempt bonds on behalf of the City payable over 21 years from the revenues from the Facility;

WHEREAS, the Foundation will enter into a ground lease (the "Ground Lease") with the Developer for the lease of the land upon which the Facility will be situated;

WHEREAS, the Public Development Authority (the "Authority"), a duly created public corporation pursuant

to RCW 35.21.730 through 35.21.757, inclusive, is authorized as a public purpose to own and acquire property and property rights by purchase, gift, devise, or lease for the construction, maintenance, or operation of off street parking facilities, including the acquisition of the Facility in order to improve governmental efficiency and services, the general living conditions in the City, which necessarily includes the City transportation system;

WHEREAS, development of the Facility will promote the growth and development of retail businesses and office uses in the CBD which will increase payrolls, business productivity, and property values thereby benefiting the public health, safety and welfare;

WHEREAS, the City has been advised by the Developer that the Foundation will acquire the Facility from the Developer to provide off-street public parking;

WHEREAS, the City has been advised by the Foundation that the Foundation anticipates leasing the Facility and assigning the Ground Lease to the Authority;

WHEREAS, on October 17, 1996, the Council held a public hearing on the Facility pursuant to the requirements of RCW 35.86.050;

WHEREAS, the City has been advised that the Authority will publicly bid the operation of the Facility;

WHEREAS, after the payment of the principal of and interest on bonds issued by the Foundation (the "Bonds"), full legal and unencumbered title to the Facility will pass to the City without cost;

WHEREAS, the City has determined it is in the best interests of the City and its inhabitants, ratepayers and

taxpayers that the Facility be maintained and operated in a first-class condition;

WHEREAS, RCW 35.21.730(1) authorizes the City to transfers [sic] its funds to the Authority with or without consideration;

WHEREAS, the Council is desirous of creating a parking meter revenue fund, into which parking meter revenue will be deposited and contingently pledged to pay Operating Expenses of the Facility and Ground Lease Payments in the event that Facility revenues are insufficient, thereby ensuring the Facility is maintained in a first-class condition;

WHEREAS, chapter 35.59 RCW authorizes the City to combine two or more facilities in a single multi-purpose community center in order to more effectively and economically provide municipal services. City Hall, Riverfront Park, and the main branch of the Spokane Public Library, constitute the multi-purpose community center system for the downtown area;

WHEREAS, the acquisition, development and operation of the Facility will reduce costs, avoid duplication of off-street parking facilities that serve the existing downtown system and make off-street parking more convenient and useful to the residents of Spokane;

WHEREAS, chapter 35.71 RCW, authorizes the Council to establish pedestrian malls and related facilities in rights-of-way, including off-street parking facilities in the vicinity of a pedestrian mall when the right-of-way is proposed to be vacated;

WHEREAS, the Council, upon receipt of a petition to vacate a portion of Post Street from Spokane Falls Boulevard to Main Avenue, adopted Resolution 95-75 declaring the intent of the Council to proceed with the street vacation as set forth in Ordinance C31403 which will facilitate the development of a pedestrian mall area for the Riverpark Square project as set forth above;

WHEREAS, the Developer, on May 7, 1996, submitted to the City an Environmental Checklist (pursuant to SEPA), including a Traffic Impact Analysis-Riverpark Square Expansion (including Level of Service Worksheets) and an Air Quality Analysis plus Study Update ("Environmental Reports") with the City through its responsible official issued a Mitigated Declaration of Nonsignificance;

WHEREAS, the CBD has experienced a serious economic decline which affects the built environment and climate for civic facilities with remaining business operators facing reduced employment, all adversely affecting the citizens of the City and causing deterioration of the public and private investment in improvements and services in the CBD, including the downtown multi-purpose community center system comprising of City Hall, Riverfront Park and the main branch of the Spokane Public Library;

WHEREAS, the Project is expected to contain 300,000 square feet of new retail, entertainment and other business uses, preserving and creating approximately 2,800 jobs in Spokane;

WHEREAS, the Project will improve public safety in the CBD, including the financial stability of the City, by adding an estimated $3 million in tax revenues per year;

WHEREAS, the Walker Report, the Environmental Reports, other reports, analyses and testimony indicated that the Facility will aid downtown vehicle and pedestrian circulation by efficiently removing vehicles from the street system, promoting improved vehicle movements and providing for the parking demand created by the downtown multi-purpose community center system, including City Hall, Riverfront Park and the main branch of the Spokane Public Library;

WHEREAS, the Council has received reports and testimony from individuals and experts that support the acquisition of the Facility for public purposes, reviewed plans for development of the Project, as well as listened to and considered public testimony and received reports concerning the parking needs in the CBD, projected Facility revenue, benefits to the City and its citizens and the transfer to the City of the Facility and related property interests;

WHEREAS, the City will acquire full legal and unencumbered title to the Facility without cost or other consideration upon payment of the Bonds;

WHEREAS, the City has received a letter from the Developer containing Project information and a deadline indicating that time is of the essence concerning the Project and the Facility, such that immediate assurances must be given by the City in order for the Developer to proceed with the Project, including the Facility, thereby serving a public purpose;

WHEREAS, the Developer has stated that for the Project to proceed commitments must immediately be received from tenants and lenders so that preparations for demolition and construction can commence in order to timely complete the Project as represented to Developer's lenders and other project participants, including the City, the Foundation, the Authority and the major Project tenants;

WHEREAS, without a commitment from the City to immediately contingently pledge its parking meter revenue to Operating Expenses and Ground Lease Payments, tenants and lenders are not assured that there will be adequate public parking to serve the Project and civic facilities, thus placing the Project is jeopardy; and

WHEREAS, the City finds, based on studies, documents and public testimony presented to the Council, that the Project will: (i) provide new jobs to the Spokane area, (ii) stimulate the economy, (iii) provide cultural opportunities and (iv) improve the quality of life through a reinvestment in the CBD which will generate additional tax revenue and that the failure of the Project to proceed will cause the City to suffer economic decline;

NOW, THEREFORE, IT IS FURTHER ORDAINED, as follows:

Section 1. Definitions.

All words and terms as used in this Ordinance and the preambles hereto shall have the following meanings unless the context or use clearly indicates another or

different meaning or intent. Words of the masculine gender shall be deemed and construed to include correlative words of the feminine and neuter genders. Words importing the singular number shall include the plural number and vice versa unless the context shall otherwise indicate.

"Authority" shall mean the Spokane Public Development Authority duly created by Ordinance No. C-29241 of the City of Spokane, adopted by the Council on November 7, 1988.

"Bonds" shall mean the bonds issued by the Foundation to finance the cost of acquiring the Facility.

"City" shall mean City of Spokane, Washington.

"Council" shall mean the City Council, as the same may be duly constituted from time to time.

"Developer" shall mean, collectively, Lincoln Investment Company of Spokane and Citizens Realty Company.

"Facility" shall mean the seven-level above ground and one-level below ground off-street parking facility in the vicinity of Spokane Falls Boulevard and Post Street.

"Foundation" shall mean the Spokane Downtown Foundation.

"Ground Lease" shall mean the Ground Lease between the Developer and the Foundation regarding the real property underlying the Facility.

"Ground Lease Account" shall mean the account by that name created by the Authority within its Revenue Fund from which the Authority shall make Ground Lease Payments.

"Ground Lease Payments" shall mean all payments the Foundation is required to make under the Ground Lease.

"Operating and Maintenance Account" shall mean the account by that name created by the Authority within its Revenue Fund from which the Authority shall pay Operating Expenses.

"Operating Expenses" shall mean all of the Authority's expenses incurred with respect to operating and maintaining the Facility. The term "Operating Expenses" shall not include any extraordinary, nonrecurring expenses, any costs or expenses for new construction, interest, amortization, any allowance for depreciation or any taxes or payments in lieu of taxes upon the properties or earnings of the Facility payable to the City.

"Ordinance" shall mean this Ordinance No. C31823.

"Parking Meter Revenue Fund" shall mean a special fund of the City created by Section 4 of this Ordinance.

"Parking Meter Revenues" shall mean all income, receipts and revenues, except revenue derived from the enforcement of City parking laws, received by the City through its ownership and operation of its system of parking meters.

"Parking Revenues" shall mean all income, receipts and revenues received by the Authority through the ownership and operation of the Facility, including investments earnings on money in the Revenue Fund.

"Project" shall mean, in addition to the Facility, an approximately 300,000 square fee of gross feasible area

for new retail stores, restaurants and entertainment uses in the project area.

"Revenue Fund" shall mean the Authority's Parking Facility Revenue Fund, which includes the Ground Lease Account and the Operating and Maintenance Account.

Section 2. Public Hearing.

In accordance with RCW 35.86.050, a public hearing has been conducted on the receipt by the City of full legal and unencumbered title to the Facility, including the presentation of reports related to the parking needs of civic center facilities in the CBD, traffic impacts of the Project, economic projections of Facility revenue, and a description of the plans which relate to the development of the Facility and the Project. Further, the Council has considered testimony from members of the public, representatives of the Developer and experts employed by the City in connection with the Facility. Reports and plans relating to off-street parking needs and the Facility have been presented and received by the Council and are filed in the office of the City Clerk.

Section 3. Authority of the City.

The City, pursuant to chapters 35.86 and 35.71 RCW and other laws of the state of Washington, shall acquire, without any consideration, for public parking purposes, full legal and unencumbered title to the Facility described in the plans and specifications on file in the office of the

City Clerk and a leasehold interest for property underneath the Facility after the Foundation has paid, in full, the principal of and interest on its Bonds.

Section 4. Public Purpose.

The public purpose and interest will be served by providing short-term public parking in the CBD through operation and maintenance of the Facility by the Authority in accordance with Parking Covenants and a Parking Agreement and transfer full legal and unencumbered title of the Facility from the Foundation to the City.

Section 5. Valuable Asset.

The leasehold interest in the real property under the Facility and the Facility itself are valuable municipal assets which will benefit adjacent municipal properties including, but not limited to, Spokane City Hall, the main branch of the Spokane Public Library, and Riverfront Park by providing safe, convenient and adjacent public parking.

Section 6. Improved Access.

The Facility will improve public access to, and circulation within, the CBD, preventing congestion and facilitating private and public transportation within a part of the City that contains arterial streets by providing approximately 1,304 public parking spaces for use, all as set forth in the Environmental Reports and the Walker Report as supplemented, which are on file in the office of the City Clerk. Further, the Facility will also increase

pedestrian activity by efficiently removing automobiles from the street, thereby contributing the viability and safety of pedestrian movement within the CBD.

Section 7. Documents.

The receipt by the City, without cost or any consideration, of full legal and unencumbered title to the Facility will be accomplished by:

A. a resolution of the Council, approving a plan to finance the acquisition of a public parking facility by the Foundation through the issuance of tax-exempt revenue bonds for a term of not to exceed 21 years, and providing for other matters properly relating thereto;

B. a Parking Garage Purchase and Sale Agreement between Developer and the Foundation;

C. a Ground Lease between the Developer and the Foundation;

D. a Parking Agreement and Parking Covenants between the Developer and Nordstrom, Inc., a Washington corporation;

E. a Parking Garage Lease Agreement by and between the Foundation and the Authority;

F. an assignment of the Ground Lease by the Foundation to the Authority; and

G. a Ground Lease between the City and the Developer.

In addition, the City shall enter into a contract with the Housing and Urban Development ("HUD") to loan

$23,800,000 for the Project, as described and according to the terms of the HUD loan application which was submitted to HUD on June 23, 1995.

Section 8. The Parking Meter Revenue Fund.

There is hereby created and shall be maintained in the office of the Treasurer a fund separate and distinct from all other funds and accounts of the City, designated the "Parking Meter Revenue Fund" (the "Parking Meter Revenue Fund"). All Parking Meter Revenue shall be deposited into the Parking Meter Revenue Fund upon receipt. Money shall be withdrawn from the Parking Meter Revenue Fund to maintain public streets and roadways within the City and for the purposes set forth in Section 9 of this Ordinance. The City shall maintain the number of parking meters at approximately the number that exists on the date of this Ordinance and shall charge parking meter rates that are market rates.

Section 9. Contingent Pledge of Parking Meter Revenue Fund.

The City hereby pledges, as a first charge and lien, that, in the event Parking revenues are insufficient to make Ground Lease Payments and pay Operating Expenses, the City shall loan money from the Parking Meter Revenue Fund (but only to the extent money or investments are then on deposit or allocable to the Parking Meter Revenue Fund) to the Authority's Ground Lease Account and Operating and Maintenance Account in an amount that is no more than is necessary, together with such other money as is on hand and available in the

Ground Lease Account and the Operating and Maintenance Account, to permit the Authority to make Ground Lease Payments and to pay Operating Expenses. The City covenants to maintain parking meter rates at a level to produce an amount each year that, together with other legally available money loaned to the Parking Meter Fund, will equal Ground Lease Payments and Operating Expenses budgeted for that year. Notwithstanding the foregoing, the City specifically does not: (i) pledge to maintain money in the Parking Meter Revenue Fund; (ii) pledge revenue derived from the enforcement of City parking laws to the Parking Meter Revenue Fund or any transfer therefrom; (iii) pledge the City's full faith, credit and resources, or money in the City's General Fund to the payment of Ground Lease Payments or Operating Expenses; or (iv) pledge any assets of the City to the payment of principal of or interest on the Foundation's Bonds.

Section 10. Operation of the Facility.

The City hereby covenants that once it receives full legal and unencumbered title to the Facility that it will: (i) operate and maintain the Facility in a first-class condition, (ii) establish reasonable hours of operation, (iii) operate the Facility for the use of the general public and (iv) establish parking rates at levels sufficient to pay the City's Operating Expenses and Ground Lease payments relating to the Facility and to encourage short-term hourly parking.

Section 11. Delegated Authority.

The City Manager, the City Attorney and their designees, plus bond counsel, Perkins Coie, are authorized in their reasonable judgment to take all acts as appropriate or necessary in order to carry out and complete the transactions contemplated by this Ordinance.

Section 12. Repeal of Section 43 of Ordinance No. C31398.

Section 43 of Ordinance No. C31398 (codified as 16.61.5920), adopted June 5, 1995 is hereby repealed in its entirety.

Section 13. Severability.

If any one or more of the covenants or agreements provided in this Ordinance to be performed on the part of the City shall be declared by any court of competent jurisdiction to be contrary to law, then such covenant or covenants, agreement or agreements, shall be null and void and shall be deemed separable from the remaining covenants and agreements of this Ordinance and shall in no way affect the validity of the other provisions of this Ordinance.

Section 14. Urgency and Emergency; Effective Date.

Pursuant to Section 19 of the City Charter, this Ordinance will: (i) have the direct benefit of promoting the creation of employment in the CBD, (ii) have the effect of stimulating the economy, (iii) provide recreational and cultural opportunities and (iv) improve the quality of life

for the Spokane community through a reinvestment in the CBD, which will generate increased tax revenues as estimated in the studies, documents and public testimony presented to the Council. The immediate passage and effectiveness of this Ordinance will promote downtown revitalization and reverse the economic decline of the CBD by promoting the construction of the Project, including the Facility, which will become a valuable municipal asset inuring to the public benefit. The public purposes of this Ordinance will be lost if assurances of City participation, including a contingent pledge of its Parking Meter Revenue to pay Operating Expenses and Ground Lease Payments, are not immediately made and effective upon passage of this Ordinance.

The City further recognizes that the Developer must immediately execute leases to commit Nordstrom, plus other major tenants to the Project otherwise the Project will not be ready for occupancy and operation by the dates contractually required. If this contractual promise cannot be performed the Project will not be built and severe economic and other consequences will ensue. Further, the Developer has indicated that adequate public parking must be available to serve the Project and civic facilities before tenants will commit to the Project. Therefore, the Developer must receive assurances of City participation prior to pledging land and capital in order to obtain public and private financing to develop and construct the Project which will enable the Foundation to issue tax-exempt bonds and acquire the Facility.

Based on such facts and studies, reports and testimony, the Council finds that the loss of the Project will

result in a loss of jobs, tax revenue, recreational opportunities which at the same time diminishing the quality of life for a substantial number of the City's citizens.

Based on such facts, the Council finds and declares that an urgency and emergency exists such that this Ordinance shall be immediately effective upon adoption in order to preserve the public peace, health or safety and provide support of the City government and its existing public institutions, facilities and infrastructure.

Section 15. Publication.

The City Clerk shall publish in the City's official newspaper, the title and text of this ordinance, which will be available for inspection in the Office of the City Clerk.

PASSED the City Council this 27th day of January, 1997.

/s/ Jack Geraghty
Jack Geraghty, Mayor

Attest:

/s/ Terri L. Pfister
Terri L. Pfister, City Clerk

Approved as to form:

/s/ Stanley Schwartz
Assistant City Attorney

APPENDIX F

WITHERSPOON, KELLEY, DAVENPORT & TOOLE
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[names omitted in printing]

January 27, 1997

Mayor Jack Geraghty and Members of Spokane City Council

Dear Mayor and Council Members:

We are counsel for Lincoln Investment Company of Spokane and Citizens Realty Company, the owners of downtown property at River Park Square, who have proposed a $100 million project for revitalizing downtown Spokane. The key component of the proposal is the City's immediate pledge of parking meter revenue to contingently support the lease and maintenance obligations of the Spokane Public Development Authority ("PDA") to operate a parking garage to be built by River Park Square, sold to the non-profit Spokane Downtown Foundation, and leased to the PDA. The proposal calls for the City of Spokane to take unencumbered title to the garage, at no cost to the City, upon payment of the tax-exempt bonds by the Foundation, which is estimated to occur in twenty years.

This letter is being sent to you to impress upon the City the extreme urgency for having the City Council at

its regular meeting on January 27, 1997, take effective and final action on the off-street parking ordinance to accomplish the pledge of the parking meter revenues. It is the considered conclusion of the developer that, if this ordinance is not immediately effective, the Spokane community will lose the $100 million downtown revitalization project, causing a huge economic loss to the City and the people of Spokane.

As the City knows, the downtown revitalization project is comprised of three elements:

(1) Expansion and renovation of River Park Square parking garage;

(2) Construction of a new three-story building to house Nordstrom, Inc.; and

(3) Construction and renovation of approximately 270,000 square feet of additional retail space that will house a variety of retail tenants, including a proposed multi-screen cinema complex. The retail portion of the project, taken in conjunction with the existing parking needs of River Park Square, Riverfront Park, City Hall, the new City Library, and the nearby federal office complex, will cause a significant public parking demand for downtown Spokane that can be satisfied by expansion and renovation of the existing River Park Square parking facility. The Spokane Downtown Foundation is the best available mechanism for financing such an expansion and renovation, given the ability of that non-profit corporation to issue tax-exempt bonds under the Internal Revenue Code.

The revitalization project is contingent on several things occurring:

(1) Finalizing a long-term lease with Nordstrom, Inc.;

(2) Finalizing a HUD-guaranteed private loan for construction of the Nordstrom store and other retail space;

(3) Obtaining by the developer private financing for the balance of the retail project;

(4) Obtaining by the developer interim private financing for expansion and renovation of the parking facility; and

(5) Obtaining a significant number of commitments by other key retailers, in addition to Nordstrom, Inc., to be part of the revitalized downtown area.

None of these contingencies can occur unless the City adopts an off-street parking ordinance pledging parking meter revenue. The City's participation in this area makes the project feasible because it is only with the City's immediate support that the tax-exempt bonds can be issued, which means the garage portion of the project can be financed at interest rates approximately three percentage points less than what is available to the property owners, who have already agreed to commit approximately $75 million of cash, equity, and borrowed funds to downtown redevelopment and are receiving a reduced below-market return on that commitment. The City's participation also recognizes that the parking facility serves and will continue to serve a wide range of the public,

including visitors to City Hall, the City Library, Riverfront Park and other civic and retail activities downtown.

The key requirement of major project tenants is that adequate parking will be constructed and available for a reinvigorated retail area in downtown Spokane. Commitments from these key tenants and other retailers cannot be obtained until the parking issues are resolved, since retailers as a group will not commit to a downtown environment that will have inadequate parking. Without the tenant commitments, the other parts of the project cannot come together. The final arrangements for obtaining the construction loan concerning the parking garage cannot be attained because it is the commitment of retailers to downtown that provides revenue to pay back bonds issued to purchase the garage. Just as importantly, however, the developer cannot finalize its private financing for the balance of the project and the proposed HUD-backed Section 108 loan until the City commits to the parking garage since the Nordstrom lease and land lease payments by the Foundation to the developer provide a collateral base for both the HUD-backed loan and the private financing.

There are several key meetings with retailers scheduled to obtain immediate commitments from the retailer's real estate committees to timely have their stores located in downtown Spokane. If the City's action in pledging the parking meter revenue is not effective and finalized tonight, these retailers will not commit to the required time schedule to come downtown. A delay of 30 days or even two weeks is fatal because the final approval of the HUD 108 loan, private financing, and issuance of the

bonds are all contingent on each other. In turn, each of these components is contingent and dependent on retailer commitments because it is the commitment of the retailers that provides the revenue, from lease payments and parking revenue generated by their customers, to fund all aspects of the project bond repayment, HUD 108 loan repayment, and private financing repayment. If these retailers cannot be assured within the next week that the City has made its final irrevocable commitment to the garage through pledging of parking meter revenues, the other components of the project cannot be timely finalized in order to begin Spring demolition and construction to meet September 1997 and March 1999 deadlines. To put it simply, a delay of 30 days while awaiting effectuation of the off-street parking ordinance will kill the project. That means major retailers will continue to abandon downtown Spokane, continuing the dramatic decline that has eroded the City's most significant tax base, resulted in the continued loss of jobs, jeopardized the City's visitor and convention business, and created a blighted area that detracts from the civic center located nearby as reflected in Riverfront Park, City Hall, and the City Library.

Tenant lease requirements mandate that construction of the parking garage and Phase I of the project be completed prior to March of 1999. Initial construction relating to the project must meet earlier deadlines that have been imposed by the retailers. The slab level of the Nordstrom store, for instance, must be completed by September of this year in order to meet the March, 1999, deadline. This means that demolition of existing structures and construction of the project must be started

within the next two months, and it will take that approximate amount of time to arrange for issuance and sale of the parking revenue bonds and complete other financing details.

If the City does not take final action immediately in pledging parking meter revenue, the economic loss to the City, as demonstrated in studies that have previously been presented to the City Council, is catastrophic. Downtown continues to deteriorate, as evidence by vacancies in the Bennett Block, the old Penney's Building, the old Lamont's Building, the space formerly occupied by Newberry's, and the Crescent Annex. Because of this decline in the downtown retail environment, downtown property values continue to fall, downtown retail sales continue to decline, local downtown businesses and national firms continue to fail and close their doors, and jobs in the downtown retail core continue to disappear. The studies that have been submitted to the City indicate that, if the downtown River Park Square project does not become a reality, the loss in annual tax revenue to the City is approximately $3 million, the loss in payroll to the citizens of Spokane is approximately $50 million annually, and a downward swing of 2,800 jobs will result.

Given the timing issues and deadlines that relate to the project, these severe economic consequences will result if the City Council does not take final action on January 27. Simply put, the retailers need the City's final and effective commitment tonight. Otherwise, the project cannot be financed and developed.

On behalf of Lincoln Investment Company of Spokane, Citizens Realty Company, the downtown

community, and the citizens of Spokane generally, we sincerely request the City make the off-street parking ordinance final and effective on January 27, 1997.

Very truly yours,

WITHERSPOON, KELLEY,
DAVENPORT & TOOLE, P.S.

By /s/ Duane M. Swinton
DUANE M. SWINTON

DMS:kje
G:/DOC/DMS/SPOKANE.LTR

APPENDIX G

WARNING

Under Washington State law, every person who signs an initiative or referendum petition with other than his or her true name, knowingly signs more than once, or signs when he or she is not a legal voter or who makes any false statement on such petition may be punished by fine or imprisonment or both.

REFERENDUM PETITION TO THE SPOKANE CITY COUNCIL REFERENDUM NO. 97-1

We, the undersigned citizens and legal voters of the City of Spokane, Washington, respectfully direct that the entirety of Ordinance No. C-31823, passed by the City Council on January 27, 1997, and entitled AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SPOKANE RELATING TO OFF STREET PARKING FACILITIES; PROVIDING FOR THE DEVELOPMENT AND ACCEPTANCE OF FULL LEGAL AND UNENCUMBERED TITLE TO THE RIVER PARK SQUARE PARKING GARAGE LOCATED ADJACENT TO CIVIC CENTER FACILITIES; CREATING THE PARKING METER REVENUE FUND; CONTINGENTLY PLEDGING MONEY IN SAID FUND TO MAKE CERTAIN PAYMENTS TO THE CITY'S PUBLIC DEVELOPMENT AUTHORITY; DECLARING AN URGENCY AND EMERGENCY AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO a concise summary of which is printed herein (on the reverse side), be repealed, or be submitted to the electors of the City of Spokane for their approval or rejection at the next municipal election. I understand that should this petition be sufficient and

timely filed, the ordinance, will be suspended from taking effect until approved by the voters. Each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the City of Spokane; my residence address is correctly stated; and I have knowingly signed this petition only once.

PETITIONER'S SIGNATURE	PRINTED NAME	RESIDENCE ADDRESS (STREET ADDRESS)	✓ IF VOTER REGISTRATION ADDRESS IS DIFFERENT
13 Rondo O Birch	Rondo O. Birch	W 3029 Beacon	
Velma Kim Birch	Velma Kim Birch	W. 3029 Beacon	
Floyd L Miller	FLOYD L. MILLER	W 2225 Holyoke	
Doug Mitchell	DOUG MITCHELL	W. 3105 BEACON	
Cheryl C Mitchell	Cheryl C. Mitchell	W 3105 Beacon	
John R Di Stefano	John R Di Stefano	W 3030 Beacon	
Raymond Fule	Raymond E. Fule	4315 W Arrowhead	
Jerene G Rogers	Jerene G. Rogers	2917 W. Beacon	
Martha J Puckett	Martha J. Puckett	2931 W Beacon	
Leta A Qualls	LETA A. QUALLS	2927 W Beacon	
Ron Thaxton	RONALD THAXTON	2930 W BEACON	
Carole Thaxton	Carole Thaxton	2930 W Beacon	
Charles N Miles	CHARLES N. MILES	2921 W BEACON	
Keith Simmonds	Keith Simmonds	3016 W. BEACON	
Teresa Wright	TERESA WRIGHT	3104 BEACON	
Tony Wright	TONY WRIGHT	3104 BEACON	

Sponsor: Priorities First, 2525 E. 29th Ave., Suite 108 Box 284, Spokane, WA 99223 (509) 325-6691

BEST AVAILABLE COPY

Summary
(For the Summary, the Agenda Wording and Background Pertaining to the Ordinance Are Used)

AGENDA WORDING: An ordinance relating to off-street parking facilities establishing the public purpose and method of acquisition.

BACKGROUND: Previously, the Spokane City Council considered the acquisition of a parking garage in connection with the redevelopment of Riverpark Square. After public testimony and further discussion with the developer of Riverpark Square, the acquisition of a parking garage by the City will be through a non-profit corporation issuing debt to purchase the garage. The Public Development Authority of the City of Spokane will operate and lease the parking garage for public parking purposes. After the debt has been paid off by the non-profit corporation through parking garage revenues, the City will own the parking garage free and clear of all encumbrances. To ensure that the garage is properly operated and maintained prior to acquisition by the City, the City will contingently pledge its annual parking meter revenues.

APPENDIX H

* * *

[p. 545] that this is the only way to save our city, that personally, I think, there are other creative plans that can be used, then great, go ahead and vote for it, but vote for an open vote of the people of the City of Spokane and then everybody in this city will have a say and then we really will have a true accountability.

Thank you very much for your time. I sure appreciate it.

THE MAYOR: I am going to, as I indicated when we started this, close the testimony now. I know there's still a lot of people here, virtually all of them wish to speak in favor. I think there's only one person left who wishes to speak against, Mr. Crobath (phonetic), but I am going to move ahead and close the testimony so that we can have a council discussion and get as close as we can to the 11:00 time, although I realize we'll probably go beyond that tonight.

Is there anything any council member has to add now? We have a couple of motions in front of us. We have the first motion, which is the motion to attach an emergency clause to the ordinance. That requires a simple majority, and [p. 546] just simply a voice. Does council have anything they wish to add to that? Mrs. Holmes.

MS. HOLMES: I think it's important to recognize the fact that the Webster's definition of emergency is not really what we're looking at here, and for my own purposes, I rely on the majority opinion, that the decision

offered up by the Supreme Court of the State of Washington, written out by Justice Alexander, relative to did an emergency exist in the situation in King County with the Mariners Stadium, and that was not a Webster's decision.

I think that that is important to recognize, legalese in terms of emergency.

COUNCIL: Excuse me. I might just say one thing, and it's been talked about a little bit, that I have been in this business and it was kind of interesting, Mr. Ferguson's been in it for 25 and Mr. Fandel for 20, that is a total of 45, and I've been doing this kind of work for 41 years myself. I've got some background.

But let me just tell you a little story about what can happen with a fragile time limit, ain't an emergency, so to speak. How can you have an emergency last fall and still have an [p. 547] emergency today?

Remember that when it was discovered last fall that the council was going to be unable to go forward on the basis of which we were talking about then, it was incumbent upon the developer to go back and say, okay, hey, Nordstrom, will you extend, give us some additional time to find a way of doing this.

You can say yes, you can have an emergency back then and, yes, you can have an emergency today and it's still an emergency.

I'll tell you a little bit about University City, because when I went to work in this business in 1956, one of the reasons I went to work in it with Mr. McCarthy was that University City was going to get built and opened in 1957.

He was working on that development and the key element in that particular development was a commitment from the J.C. Penney company to take a space, a building, in that particular center.

That commitment, we had a letter of intent, a commitment letter, so to speak, which was up in December 31 of 1956. Certain things [p. 548] happened and we had to put together property in order to fulfill that commitment, there had to be a certain amount of property that had to be put together.

It took until sometime in December, about December 15, as I recall, of 1956, to get to that point. We notified the J.C. Penney company that we were there, the documents were not done, the documents were not done, and so they didn't get done until sometime in January.

We assumed, because they had not said otherwise, that even though they didn't get done by December 31, the J.C. Penney would go ahead and, because this was something they wanted to do, they wanted a store in the valley, and well what happened is history, they did not. They did not go in 1957.

University City, including J.C. Penney, was not opened until 1965. There is a drop dead date in this business, believe me. I have been there. I understand what it is.

We can talk about, and we talked to Mr. Craven a week ago or so about that this was giving them an unfair competition. As a matter of fact, all it does is level the playing field.

[p. 549] See, we're going to have an unlevel playing field. As a matter of fact, this particular thing, if we do it, is going to merely level the playing field.

What they're going to end up with, they're going to have to charge the same basic kind of rents that are being charged in Mr. Sabey's development at Northtown and, again, in order to pay for the cost of the balance of the project, it has to be done. So it's not going to be unlevel in that regard.

So there is a time, there is a place for what is being suggested here and now it's up to us to consider that.

THE MAYOR: Thank you. Are there any other counsels on the amendment that we're voting on first? Mr. Colliton.

MR. COLLITON: I'd like to give these comments now, and I don't know if it's appropriate this late, but I'll go ahead and give them anyway.

The aspect of whether or not I should vote for an emergency ordinance to get this project started has been very troubling to me, and I've really tosselled with it.

[p. 550] While I remain 100 percent in support of this project and any other project, for that matter, that will help revitalize our community's heart, the word emergency, as I envision emergency in the form of public safety, is very troubling.

Having said that, I am convinced that in the referendum process that our community would eventually see the vision of a downtown that is safe, secure, prosperous, and they would vote in favor of the project.

It's timely tonight that we had 15-minute presentations by four of our neighborhoods that are in close proximity to downtown. Those are the neighborhoods that are going to be directly affected by the downtown, whether it happens or doesn't happen.

I mentioned the referendum process and my confidence in that because of the confidence in the continued correspondence in support of the project. Two weeks ago I said it was running four to one in favor, probably a little bit higher than that.

Each of us on the council has been told that, well, you haven't heard the major voice of

* * *

Supreme Court, U.S.
FILED
MAY 2 1998
OFFICE OF THE CLERK

No. 97-1807

In The

Supreme Court of the United States

October Term, 1997

CLEAN (Citizens for Leaders with Ethics and Accountability Now!), a Washington non-profit corporation, et al.,

Petitioners,

vs.

CITY OF SPOKANE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

If a city charter does not provide a right of referendum regarding emergency ordinances, is a First Amendment right implicated by the city's adoption of an emergency ordinance which is not subject to referendum?

RULE 29.6 STATEMENT

Respondents Citizens Realty Company and Lincoln Investment Company of Spokane are closely-held, non-public Washington corporations. Citizens Realty Company is a wholly-owned subsidiary of Cowles Publishing Company, a Washington corporation. Neither corporation has any subsidiaries other than wholly-owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Citizens Realty Company and Lincoln Investment Company of Spokane respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Washington Supreme Court's opinion in this case. In part, the Petition asks this Court to review the judgment of the Washington Supreme Court in an earlier case which is not now subject to direct review. Further, the present case does not raise a substantial question of federal law requiring resolution by this Court. Finally, this case simply involves the Washington Supreme Court's reliance upon well-established prior Washington precedent and the application of a properly stated rule of law. This case does not warrant review by this Court.

I. STATEMENT OF THE CASE

This Petition arises from three cases challenging the validity of a municipal ordinance authorizing limited support of a redevelopment project in downtown Spokane, Washington. The project includes a Nordstrom store, retail mall, and parking garage. The Washington Supreme Court upheld the ordinance in the face of a myriad of state law claims brought by Petitioners.

The Petition contains several misstatements of fact, including allegations in its "Statement of the Case" that are wholly unsupported by any reference to the record.[1]

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[1] For example, Petitioners assert on page 7 of the Petition that the Respondents' statements regarding the necessity for

To the extent the Court requires a more accurate summary of the facts of this case, Respondents request that the Court consider the recitation of facts set forth in the Washington Supreme Court's majority opinion in this case.

---

prompt City action were false. Contrary to Petitioners' assertion, Respondents did move as speedily as possible to consummate various details of the downtown redevelopment project after the City passed the ordinance on January 27, 1997. Passage of the ordinance provided the necessary assurances to tenants and prospective lenders concerning the City's commitment to move forward with the project. A lease with Eddie Bauer was consummated in April of 1997 and construction of that store began in May and was completed in August 1997, as was removal of asbestos in other portions of the project. After removal of the asbestos, demolition of existing buildings began in November of 1997. While Respondents would have preferred to commence demolition sooner than that, Petitioners' filing of the instant lawsuit in Spokane County Superior Court in February of 1997, raising some sixteen different issues relating to the project, created an impediment to final consummation of details between Respondents and various tenants and lenders. Once the Washington Supreme Court rejected all issues raised by Petitioners in its expedited decision, announced on November 13, 1997 following oral argument on June 8, 1997, demolition commenced within ten days. It is disingenuous for Petitioners to suggest that Respondents did not act expeditiously to follow up on the ordinance, when it was Petitioners' lawsuit that caused a major delay in commencement of a substantial portion of the project.

II. REASONS PETITION SHOULD BE DENIED

A. The Washington Supreme Court's Judgment in *CLEAN v. State* Is Not Subject to Direct Review

Much of the Petition focuses on perceived flaws in the Washington Supreme Court's decision in *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1996) ("*CLEAN I*"). Petitioner CLEAN was also a party to that case, but chose not to seek review by this Court. The judgment in *CLEAN I* is not now subject to direct review.[2]

Petitioners repeatedly point to the *CLEAN I* decision, and acknowledge that they are "essentially asking this Court to review both of the Washington court's recent decisions." Pet. at 14 (referring to *CLEAN I* and this case). Petitioners also refer to the facts of the *CLEAN I* case as if they were relevant to this matter, and invite this Court to decide questions which have no significance to this case, such as "Is Ken Griffey, Jr. more important than the Constitution?" Pet. at 15. Any request for review of the Washington court's decision in *CLEAN I*, together with the Petitioners' invitation to revisit the facts of *CLEAN I*, should be denied as untimely.

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[2] Sup. Ct. R. 13.1 (petition for writ of certiorari to review judgment of state court of last resort must be filed within ninety days after entry of judgment).

B. This Case Does Not Present an Important Question of Federal Law Requiring Decision by this Court

This Court has long recognized that its jurisdiction over the decisions of state courts is limited to cases involving substantial federal questions. The Court has stated:

> The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise. And it is not likely to be presumed that Congress acted upon a principle which implies a distrust of their integrity or their ability to construe those laws correctly.

Murdock v. City of Memphis, 87 U.S. (20 Wall) 590, 630 (1875). This jurisdictional limit is now formalized in 28 U.S.C. § 1257. *See also Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

The Petition is wholly deficient because it fails to set forth any meaningful theory under which this Court's jurisdiction can or should be exercised under 28 U.S.C. § 1257(a). Rather, Petitioners seek review of a state court decision that addresses only state law issues and presents absolutely no underlying federal questions or claims. Petitioners essentially assert that this Court should review this case because the state courts are incapable of ruling fairly on matters related to the scope of a state- or city-created right of referendum. *See* Pet. at 18.

As summarized above, this case involved numerous state law causes of action regarding the validity of an

ordinance adopted by the Spokane, Washington City Council. Petitioners do not assert that any federal questions were presented for decision at the trial court level or in the Washington Supreme Court. It is clear that no federal question was decided by either the trial court or the Washington Supreme Court. The purported federal claim advanced by Petitioners, which was raised for the first time in a motion for reconsideration after the Washington Supreme Court's decision, is that their First Amendment rights were violated because the court applied a new rule of law that abridged their "fundamental right of referendum." Pet. at 3. This assertion fails to state any viable federal claim, and certainly does not present an important question of federal law requiring resolution by this Court.

The Petition proposes that this Court resolve a question "not yet decided" in *Meyer v. Grant*, 486 U.S. 414 (1988) – whether the First Amendment's protection of core political speech encompasses the scope of initiative and referendum rights. Pet. at 21. Petitioners request that the Court consider this issue rests on the dual implication that this case involves 1) a right guaranteed by the Washington constitution, the interpretation of which will have broad impacts beyond this case, and 2) an issue with respect to which there is some uncertainty in the courts. Neither argument is correct.

Contrary to the statements of Petitioners, this case does not involve a right of referendum guaranteed by the Washington Constitution. Pet. at 21. This case presents a narrow issue involving the referendum process set forth in the City Charter of Spokane, Washington. *See* Pet. at 2-3 (providing excerpts of relevant charter provisions).

Such a local right of referendum is not created or required by the Washington Constitution. *See O'Day v. King County*, 109 Wn.2d 796, 815, 749 P.2d 142 (1988). Instead, Washington municipalities may choose whether or not to provide their citizens with the opportunity to engage in the referendum process at the local level. If they elect to provide a right of referendum, the scope of that right is determined in reference to the municipality's charter. *Id.*[3] As a result, this case is of limited applicability beyond that small set of persons, including Petitioners, who might attempt to file a referendum in the City of Spokane. The case presents no federal question of broad importance or legal issues of national concern, and is not an appropriate case for review on *certiorari*.

This case also does not present any open questions which require resolution by this Court. *Meyer*, relied on by Petitioners, considered the constitutionality of a Colorado statute which criminalized the practice of paying persons to circulate initiative petitions that were expressly permitted by state law. The Court held that state restrictions on the circulation of initiative petitions impacted core political speech, and should be subject to heightened First Amendment scrutiny. 486 U.S. 420-422. Petitioners assert that *Meyer* left undecided the issue of

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[3] The Washington Supreme Court in this case properly applied the Spokane City Charter in order to determine the availability of a referendum. Pet. App. at 15a-16a. The Court looked to its prior decision in *CLEAN I*, which involved the referendum right guaranteed in the state constitution, because that case interpreted emergency clause language contained in both the Spokane City Charter and the Washington Constitution. Pet. App. at 16a.

whether a state may restrict "the core" of its citizens' right of initiative and referendum consistent with the First Amendment. Pet. at 16-17. However, the Court in *Meyer* in fact recognized that states are not required to grant a right of referendum or initiative, and have the power to ban these avenues entirely. The Court quoted with approval the Tenth Circuit Court of Appeals' holding that "*[h]aving decided to confer the right* [of initiative], the State was obligated to do so in a manner consistent with the Constitution . . . " 486 U.S. at 420 (emphasis added). In reviewing the Court of Appeals' decision in an earlier case, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Court further stated that "it [*Posadas*] does not support the position that *the power to ban initiatives entirely* includes the power to limit discussion of political issues . . . " 486 U.S. at 425 (emphasis added).[4]

Meyer thus acknowledged the distinction between state restrictions on the circulation of initiative petitions, which process implicates core political speech, and a state's general regulations regarding the availability of the initiative or referendum process, which does not. This case involves the latter. The Spokane City Charter has *never* provided a right of referendum with respect to ordinances that are immediately effective as a result of a legislative determination of emergency. Spokane City Charter Sections 19(a)(1); 83. (Set forth in Pet. at 2-3).

---

[4] These determinations are consistent with the general rule that states have the power to regulate their elections and access to their ballots. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Pursuant to *Meyer*, the City of Spokane has the authority to determine whether and in what circumstances it will make the right of referendum available, and it has exercised this authority to decline to provide referendum rights with respect to emergency ordinances. Nothing in the Washington Supreme Court's decision in this case alters the scope of this referendum right or creates a new restriction on the right to seek a referendum in the City of Spokane. There can be no First Amendment violation where, as here, the power to seek a referendum as to an emergency ordinance has never existed.

Moreover, there is no conflict among the lower courts that have considered whether there is a First Amendment right to engage in an initiative or referendum. In *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1188 (1998), the Court of Appeals held that "[c]learly, the right to a state initiative process is not a right guaranteed by the United States Constitution, but is a right created by state law." *Id.* at 1113. Similarly, the Eleventh Circuit held in *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996), *rehearing denied en banc*, 99 F.3d 1157 and *cert. denied*, 117 S.Ct. 1086 (1997), that the "right to place a citizen initiative proposal on the ballot is a state created right" and not a right guaranteed by the First Amendment. *Id.* at 1497-98. The Tenth Circuit also recently held that *Meyer* does not require states to maintain petition processes that in essence allow unrestricted access to the ballot. *American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092, 1097 (10th Cir. 1997), *cert. granted*, 118 S.Ct. 1033, and *cert. denied*, 118 S.Ct. 1045 (1998). These decisions are entirely consistent with *Meyer's* recognition that restrictions on the scope of the initiative and referendum

process are different than restrictions on communication about the content of an initiative, and demonstrate the lack of an open issue or conflict requiring resolution by this Court.[5]

C. This Case Involves Only The Application of a Properly Stated Rule of Law

A petition is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law.[6] This case involves the Washington Supreme Court's *proper* application of a properly stated rule of law, making review especially inappropriate. Contrary to the assertions of Petitioners, this case does not involve a new abridgment of core political speech or any fundamental right of the citizens of Spokane, but merely applies the Spokane City Charter's long-standing prohibition on the exercise of the right of referendum with respect to emergency legislation. The Washington Supreme Court here interpreted the language of the City Charter by referring to long-standing judicial decisions interpreting similar language in the Washington Constitution.

---

[5] Petitioners recognize that this case does not raise the question whether a state may repeal provisions of its Constitution, or add new restrictions to the right of initiative and referendum through constitutional amendment. Pet. at 18. This is true, because the case does not 1) involve the Washington Constitution, or 2) concern the addition of any new restrictions on the right of referendum in the City of Spokane. The "restriction" claimed by Petitioners has always existed, because the right of referendum has never existed with respect to emergency ordinances.

[6] Sup. Ct. R. 10.

The standard applied in this case has been consistently applied by past Washington courts. The Washington Supreme Court has repeatedly held that:

> Legislative declarations of fact, such as the existence of an emergency, are deemed conclusive unless they are "obviously false and a palpable attempt at dissimulation."

Pet. App. at 16a-17a; *CLEAN I*, 130 Wn.2d at 807; *City of Tacoma v. Luvene*, 118 Wn.2d 826, 851, 827 P.2d 1374 (1992); *State ex rel Hamilton v. Martin*, 173 Wash. 249, 257, 23 P.2d 1 (1933). Contrary to Petitioners' arguments, this standard was not first recited in *CLEAN I*, and the application of this standard in this case does not create a new rule of law. *See* Pet. at 19-21. Here, the Washington Supreme Court simply followed prior well-developed Washington precedent to determine whether the right of referendum was available with respect to the ordinance at issue. This situation does not warrant review by this Court.

III. CONCLUSION

The Washington Supreme Court correctly ruled that the City of Spokane ordinance at the heart of this case was valid under state law. The court's decision raises no federal issue of substantial importance requiring resolution by this Court, but rather involves the application of a

properly stated long-standing rule of Washington law. The Petition should be denied.

Dated this 2nd day of June, 1998.

Respectfully submitted,

WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S.

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(3)

No. 97-1807

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IN THE

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CLEAN (Citizens for Leaders with Ethics and Accountability Now!), a Washington non profit corporation, et al.,
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v.

CITY OF SPOKANE, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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I. LIST OF PARTIES, PARENT CORPORATIONS, AND NON-WHOLLY OWNED SUBSIDIARIES

Pursuant to Sup. Ct. R. 14.1 and 29.1, Respondent City of Spokane ("the City") is a political subdivision of the State of Washington. The Spokane Public Development Authority ("the SPDA") is a public corporation created by the City pursuant to RCW 35.21.730-.757. Neither the City nor the SPDA have any parent companies or non-wholly owned subsidiaries.

II. OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents City and SPDA oppose the Petition for Writ of Certiorari to review the judgment of the Washington Supreme Court filed by CLEAN, et al.

III. STATEMENT OF THE CASE

This case stems from the City's decision to participate in the renovation and construction of a public parking garage.

After considerable study and public hearings, the City Council endorsed a proposal whereby the developers[1] would

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[1] The developers are Citizens Realty Company and Lincoln Investment Company of Spokane, Washington corporations and Respondents in the pending case.

privately borrow money to renovate and expand the public parking garage that is connected to a retail development and pedestrian mall being constructed on a vacated right-of way. Following this construction, the developers will sell the public parking garage to the Spokane Downtown Foundation ("the Foundation"), a non-profit corporation organized to promote development and other civic activities in downtown Spokane. The Foundation will then lease the public parking garage to the Respondent SPDA. Pursuant to Ordinance C-31823, the City Council agreed, inter alia, to accept unencumbered title to the public parking garage once the bonds issued by the Foundation are retired or defeased.

Section 14 of Ordinance C-31823 set forth facts supporting the need for the legislation to become effective immediately. The City Council's decision to make the Ordinance effective immediately was based on reports and studies provided to, and analyzed by, the City and testimony received during a public hearing. Spokane City Charter, Section 19, provides that an ordinance shall take effect immediately upon passage if it is "for the immediate preservation of public peace, health or safety or the immediate support of City government and its existing public institutions; provided it has in its preamble or body a statement of the facts giving rise to the necessity for immediate effectiveness, and it is

passed by a vote of one more than a majority of the council: . . ."

Section 83 of the Spokane City Charter provides for referendum of City ordinances passed by the City Council "if, prior to the date when any ordinance shall take effect, a petition signed by the qualified electors in number at least equal to ten percent of the total number of votes cast at the last preceding general municipal election, shall be filed with the clerk, protesting against the enactment of such ordinance. . . ."

The effect of these two sections is that any ordinance effective immediately is not subject to referendum.

The Petitioners challenged the adoption of Ordinance C-31823 on numerous state law grounds. Following an adverse decision by the Washington Supreme Court, the Petitioners raised, for the first time, the First Amendment issue presented here in a motion for reconsideration. The Washington Supreme Court denied the motion for reconsideration.

IV. SUMMARY OF ARGUMENT DENYING THE PETITION

Certiorari should be denied for three reasons. First the Petitioners did not raise their claim that Ordinance C-31823 violated the First Amendment of the United States

Constitution until Petitioners filed their motion for reconsideration of the Washington Supreme Court's decision upholding the Ordinance. Thus, their claim is untimely.

Second, the power of referendum is a state-created right. The Washington State Constitution does not grant a right of referendum to the people of local jurisdictions, except as authorized by the legislature. State law specifically conferred upon the City Council the power to pass Ordinance C-31823. Therefore, it was not subject to referendum. Furthermore, the people of Spokane, when they reserved the right of referendum in their City Charter, provided exceptions for exercising the power. One of the exceptions was to authorize the adoption of ordinances effective immediately. The City Council acted within the scope of authority granted it by the general laws of the State of Washington and by the people of the City of Spokane.

Third, assuming that the right of referendum involves core political speech, the Petitioners have conceded that the Washington State Constitution and Spokane City Charter protect the First Amendment right to free speech. The Petitioners in effect assert that the Washington Supreme Court misapplied the appropriate law to the facts when it concluded that Ordinance C-31823 was valid as enacted.

V. *REASONS FOR DENYING PETITION*

A. Petition for Writ of Certiorari Is Untimely.

It is untimely to raise a federal question in a motion for reconsideration to the Washington Supreme Court, except when the decision of that court unexpectedly gives rise to a federal question that the party seeking review has had no previous opportunity to assert, and could not fairly have anticipated. *See* cases cited in *Charles Alan Wright, Law of Federal Courts*, § 107, at 787 n.55 (5th ed. 1994). Petitioner's claim was not raised until after the Washington Supreme Court ruled on the merits of the numerous state claims submitted to it by CLEAN.[2] Indeed, a motion for reconsideration contemplates points of law or fact that were overlooked or misapprehended in the decision. RAP 12.4(c).

Here, the First Amendment implications of the court's refusal to review the facts underlying the City's invocation of the emergency clause should have been apparent as early as the trial court's opinion, which referenced preservation of the

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[2] While constitutional issues may be raised for the first time on appeal, the Washington Supreme Court has admonished parties that "'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

people's right to referendum, as well as the court's reliance on *CLEAN v. State of Washington*, 130 Wn.2d 782, 804, 928 P.2d 1054 (1996), a case which addressed the issue of referendum and invocation of an emergency clause under a state referendum procedure. (*See* Petition at 62a-65a.) Thus, Petitioners had ample opportunity to present the First Amendment claim in a timely fashion to the Washington Supreme Court for its analysis, but did not do so. Petitioners waited until after the Washington Supreme Court issued its decision, and then asked for reconsideration. The Washington Supreme Court did not address the issue, but summarily dismissed the motion. (Petition at 41a). Accordingly, certiorari should be denied.

B. The Power of Referendum Reserved to the People of Spokane in the Spokane City Charter Is Limited by the Constitution and Laws of the State of Washington.

Ordinance C-31823 was an exercise of the City's authority, pursuant to Chapters 35.71 and 35.86 RCW, and other laws of the State of Washington to acquire facilities for the operation of public parking.

Washington courts have consistently followed the principle that direct legislation by the people of a local

jurisdiction, acting through the power of initiative or referendum, may not interfere with the exercise of any power delegated by state law to the mayor and city council as the governing body of the city. The constitutional root of that judicial principle is Article XI, Section 10 of the Washington Constitution, which provides that cities may adopt charters for home rule "consistent with and subject to the Constitution and laws" of the State of Washington. In ruling on the validity of initiative and referendum measures, Washington courts recognize that, while the inhabitants of the municipality may enact legislation governing local affairs, they cannot enact legislation that conflicts with the public policy established by state law. *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 450, 495 P.2d 657 (1972). RCW 35.71.060, relied upon by the Mayor and City Council when Ordinance C-31823 was adopted, provides in pertinent part:

> "The corporate authority may finance the establishment of a mall, including, but not limited to, right of way improvements, traffic control devices, and off-street parking facilities in the vicinity of the mall, by one or more of the following methods or by a combination of any two or more of them: . . ."

(Emphasis added.) The plans and specifications on file with the City provided for the establishment of "off-street parking facilities in the vicinity of the mall" as contemplated by RCW

35.71.060. RCW 35.86.030 further authorizes cities to acquire property for "off-street parking as the legislative bodies thereof determine to be necessary by ordinance." The power to establish such off-street parking facilities has clearly been placed with the Mayor and City Council as the corporate or legislature authority of the City, and is therefore not subject to referendum. In *State ex rel. Guthrie v. Richland*, 80 Wn.2d 382, 384, 494 P.2d 990 (1972), the Washington Supreme Court held:

> "[W]here there is a conflict between a general law enacted by the legislature and a freehold charter provision, the general law is superior to and supersedes the charter provision; and where the general law grants authority to the legislative authority of a city, that authority may not be exercised by the city as a corporate entity, nor is the exercise of that authority by the legislative authority subject to repeal, amendment or modification by the people through the initiative or referendum procedure."

The rationale for this rule is that the effect of permitting direct action by the electorate would be to limit the power conferred by the state legislature, upon the Mayor and City Council, as the legislative authority of the City and, if the statute places authority in the "corporate authority" or the "legislative authority" then the power rests exclusively with the Mayor and City Council. *Dahl v. Braman*, 71 Wn.2d 720, 430

P.2d 951 (1967), and *Neils v. Seattle*, 185 Wash. 269, 53 P.2d 848 (1936).

The power of referendum is also limited by the exception contained in the Spokane City Charter. Ordinances that are effective immediately are not subject to referendum. Spokane City Charter, Sections 19 and 83. The Spokane City Council relied on Section 19(a)(1), which provides that an ordinance is effective immediately if

> ". . . necessary for the immediate preservation of the public peace, health or safety or for the immediate support of city government and its existing public institutions; provided it has in its preamble or body a statement of the facts giving rise to the necessity for immediate effectiveness and it is passed by a vote of one more than a majority of the council; . . . "

The Washington Supreme Court found Section 19(a)(1) was virtually identical to Article II, Section 1(b) of the Washington Constitution[3]. *CLEAN v. City of Spokane*, 133 Wn.2d at 471. Article II, § 1(b) has been found to contain "two separate and distinct exceptions to the right of referendum"; (i) support of

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[3] Article II, Section 1(b) of the Washington Constitution states:

> "The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, *except such laws as may be necessary for the immediate preservation of the public peace,*

government and its existing institutions, and (ii) emergent matters dealing with the public peace, health and safety. *Farris v. Munro*, 99 Wn.2d 326, 336, 662 P.2d 821 (1983) and *State ex rel. Helm v. Kramer*, 82 Wn.2d 307, 312, 510 P.2d 1110 (1973). The "support of government" exception "does not require either immediacy or an emergency." *Farris v. Munro*, 99 Wn.2d at 336-37.

Petitioners' reliance on *Meyer v. Grant*, 486 U.S. 414 (1988) is misplaced. *Meyer v. Grant* invalidated a state law that made it a felony to pay petition circulators, it did not encumber a state's power to limit matters that are subject to referendum.

In *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1188 (U.S. 1998), the Eighth Circuit Court reviewed the Nebraska initiative process that made it burdensome for initiative proponents to gather signatures. Dobrovolny asserted a First Amendment violation. The *Dobrovolny* court noted that appellants were primarily relying upon *Meyer v. Grant*, 486 U.S. 414 in making their First Amendment challenge. "Clearly, the right to a state initiative process is not a right guaranteed by the United States

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health or safety, support of the state government and its existing public institutions . . . " (Emphasis added.)

Constitution, but is a right created by state law." *Dobrovolny*, 126 F.3d at 1113. The *Dobrovolny* court concluded:

> "Clearly, appellants can claim no constitutionally-protected right to place issues before the Nebraska electorate; any opportunity to do so must be subject to compliance with state constitutional requirements. *See Montero v. Meyer*, 13 F.2d 1444, 1446-47 (10th Cir. 1994).

Id.

Similarly, the Petitioners in this case can claim no First Amendment right to overturn the limitation on exercising the power of referendum set forth in the Spokane City Charter because the people of Spokane have placed this limitation on the power of referendum when they authorized the City Council to enact immediate legislation.

In *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996), *rehearing denied en banc*, 99 F.3d 1157 (11th Cir.), *cert. denied*, 117 S. Ct. 1086 (U.S. 1997), the Eleventh Circuit Court reviewed the Florida initiative process when a group challenged the process claiming a violation of First and Fourteenth Amendment rights. The Eleventh Circuit Court first addressed the right to petition the government and noted that it was aware of

> "no case that has held that state initiative regulations implicate the "right to petition the government for redress of grievances." *Moreover, scholarship on*

> *the issue explains that state initiative processes do not involve the sort of petitioning that is guaranteed by the Petition Clause."*

(footnotes omitted) (emphasis added) *Id.* at 1497. The Court believed that Biddulph's constitutional claim was best construed as a freedom of speech violation with reliance placed primarily upon *Meyer v. Grant, Id.* Biddulph argued the initiative process was subject to strict scrutiny. *Id.* The *Biddulph* court rejected the challenge to Florida's initiative law and a strict (or "heightened") scrutiny standard holding the "right" to place a citizen initiative proposal on the ballot is a state-created right" and not a right guaranteed by the First Amendment. *Id.*, at 1497-98. The Eleventh Circuit Court concluded that in the absence of some showing that "the initiative process substantially restricts political discussion of the issue" *Meyer v. Grant* is inapplicable. *Id.*, at 1498.

Here, the Petitioners were never denied the opportunity to engage in classical "core political speech." There was no restriction on the Petitioners' circulation of petitions, the Petitioners were able to freely communicate with the public and they even presented their petitions to their elected leaders. The First Amendment does not guarantee Petitioners the right to have their proposal placed on the ballot because the people, in adopting the City Charter, authorized the City Council to

bypass the referendum process when it granted authority to pass immediate legislation. The right of referendum power is not found in or guaranteed by the First Amendment.

Therefore, it is not necessary for the Supreme Court to evaluate, interpret, or otherwise rule on the issue of whether or not the Washington Supreme Court's decision violated the First Amendment of the United States Constitution.

C. Misapplication of a Properly Stated Rule Does Not Warrant Certiorari.

Rule 10 of the Supreme Court rules states certiorari will be granted only for "compelling" reasons. Further, certiorari will rarely be granted for the "misapplication of a properly stated rule of law." Sup. Ct. R. 10(c). The Petitioners' claim involves the misapplication of a properly stated rule of law. The Petitioners contend certiorari should be granted because the decision in *CLEAN v. City of Spokane*, 133 Wn.2d 455, 947 P.2d 1169 (1997), creates a new judicial constitutional rule abridging the right of referendum reserved to

the people by the Washington State constitution[4] and the Spokane City Charter. For the limited purpose of this response, the right of referendum is considered to be "core political speech," the abridgment of which is subject to exacting scrutiny. See *Meyer v. Grant*, 486 U.S. at 420

CLEAN does not challenge the facial validity of Washington Constitution Article II, Section 1(b), or Section 83 of the Spokane City Charter, which creates the right of referendum for citizens of local jurisdictions. Indeed, in its petition for certiorari, CLEAN specifically notes, "the Washington Constitution and Spokane City Charter already incorporated this court's high standards for protection of core political speech." (Petition at 20.) CLEAN merely argues that the judicial decision, and the court's refusal to scrutinize the facts underlying the City's decision to append Section 14 to Ordinance C-31823,[5] eviscerates the right to referendum by the substitution of a much laxer, judicially created standard not described in either the Washington Constitution or Section 83 of the Spokane City Charter.

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[4] The power reserved to the people of the state is not implicated in this case. *See* discussion, text at 9-10.

[5] The state court noted those facts underlying Section 14 of Ordinance C-31823 will not be reviewed unless they are "obviously false and a palpable attempt at dissimulation," (Petition at 17(a)).

The Petitioners' claim fails to present a sufficiently compelling justification for warranting Supreme Court review. The claim involves no important question of federal law (there is no federal right of initiative or referendum), no conflict among the law of the circuits of other states, and no conflict with the decisions of the Supreme Court.

Supreme Court Rule 10 permits review of problems that are beyond the academic or episodic, and only when the principles involved are important to the public as distinguished from the parties. *2 Federal Procedures Lawyer Edition* § 3:214 (1994). Here, the refusal by the Washington courts to question the City's use of the emergency clause is based on long-standing state precedent. *See State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 777, 380 P.2d 735 (1963); *State ex rel. Pennock v. Coe*, 42 Wn.2d 569, 573, 257 P.2d 190 (1953); *State ex rel. Pennock v. Reeves*, 27 Wn.2d 739, 743, 179 P.2d 961 (1947), *overruled on other grounds by State ex rel. Pennock v. Coe*, 42 Wn.2d 569, 257 P.2d 190 (1953); *State ex rel. McLeod v. Reeves*, 22 Wn.2d 672, 674, 157 P.2d 718 (1945). The Washington Supreme Court decision does not involve the facial validity of a constitutional right to referendum. Rather, Petitioners challenge the application of the rule in these particular circumstances. The judicial opinion represents a state court's decision regarding questions of state

law. *Charles Alan Wright, Federal Courts*, § 107 at 789 n.65 (5th ed. 1994)

VI. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.